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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 261

STANDARD MARINE INSURANCE COMPANY, LTD.,
PETITIONER,

vs.

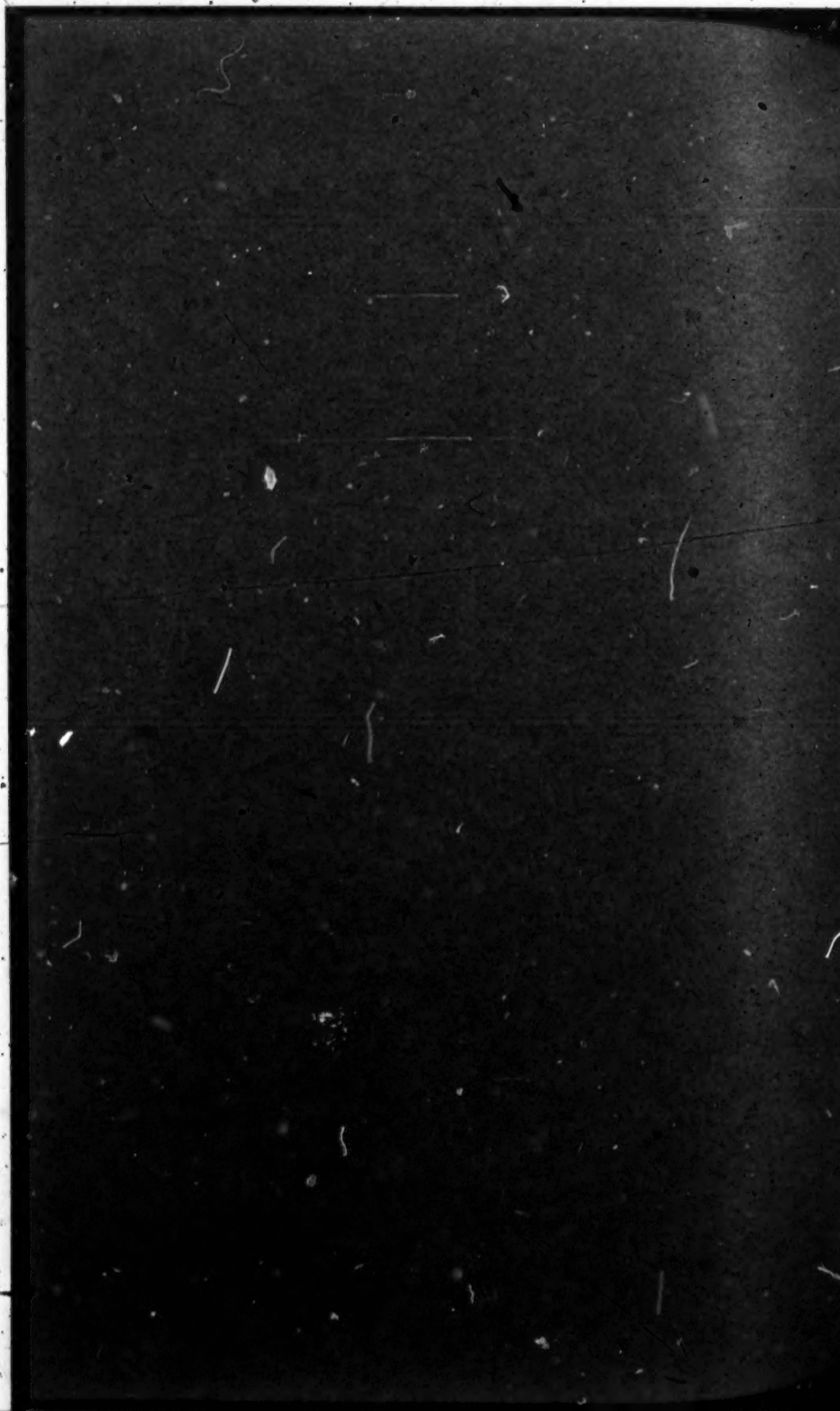
SCOTTISH METROPOLITAN ASSURANCE
COMPANY, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 7, 1930

CERTIORARI GRANTED OCTOBER 13, 1930

(35,183)



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IN UNITED STATES DISTRICT COURT

No. 2965. Admiralty

In the Matter of the Petition of the COLUMBIA STEAMSHIP Company for Limitation of Liability as Owner of the Steamer "Leonard B. Miller."

[fol. 2] LIBEL AND PETITION FOR LIMITATION OF LIABILITY—Filed Jan. 6, 1925

To the Honorable David C. Westenhaver and Paul Jones, Judges of the District Court of the United States for said District:

The libel and petition of The Columbia Steamship Company, a corporation of the State of Ohio and owner of the Steamer "Leonard B. Miller," her engines, boilers, machinery, boats, tackle, apparel and furniture, in a cause of limitation of liability, civil and maritime, alleges and propounds as follows:

1. Libellant is a corporation duly created and existing under and by virtue of the laws of the State of Ohio, having its principal office and residence within said District and is, and was at the times hereinafter mentioned, sole owner of the Steamer Leonard B. Miller, hailing from Fairport, Ohio, which steamer is now within said District, at Toledo, undergoing repairs of the damage sustained in the collision hereinafter mentioned.

2. That on the 28th day of October, 1924, said Steamer Leonard B. Miller left the port of Huron, Ohio, bound thence to the port of Duluth, Minnesota, laden with a cargo of about 9,800 tons of soft coal; that at the time of leaving Huron and at all times hereinafter mentioned, said steamer was tight, staunch, strong and seaworthy in every respect and was fully equipped and manned with a full complement of competent officers and crew properly stationed and attentive to their duties for the safe navigation of said steamer; that while in the prosecution of said voyage, that is to say, on October 29th, 1924, at 2:00 o'clock P. M., while

on Lake Huron below Harbor Beach, she was in collision with the Steamer "Glenorchy," downbound, loaded with a cargo of wheat, under the following circumstances, which your petitioner avers to be true on information and belief:

That while proceeding on the usual, customary and prescribed course for vessels upbound on Lake Huron, the weather became foggy and at 1:30 P. M., the Miller's speed was reduced to half speed and then to slow speed and fog signals were sounded at regular and proper intervals. About this time the fog signals of a downbound steamer, which proved to be the Glenorchy, were faintly heard a long distance up the Lake. The Miller continued to sound her fog signals and as the repeated fog signals of the. [fol. 3] Glenorchy became more distinct, they indicated that she was on an opposite parallel course to the Miller, a little off the port bow. The Miller blew a passing signal of one blast, and not receiving an answer in due course to this signal, the Miller having in the meantime sounded a fog signal, repeated her one blast to the downbound steamer, which then replied with a similar signal of one blast, whereupon the Miller ported to alter her course to starboard, in compliance with the one blast agreement. After hearing one or more fog signals from the Glenorchy, which were apparently broadening off the port bow, to make assurance of the understanding she repeated the one blast passing signal, which was duly answered by the Glenorchy with a like signal of one, and the Miller, which was navigating in full compliance with the requirements of law applicable to the situation, and exercising proper care, gave her engines a kick ahead on full speed ahead under hard aport helm to alter her course further to starboard. Just as the engines were started full speed ahead under hard aport helm, the Glenorchy suddenly loomed up in the fog a short distance away, heading for the Miller at high speed. The Miller at once reversed and backed full speed astern, but before her headway could be stopped the bows of the vessels came together, severe damage being done to both vessels, and the Glenorchy later sank and, with her cargo, became a total loss.

After the collision and before the Glenorchy sank, the Miller worked alongside of her, and the entire crew of the Glenorchy were rescued and taken aboard the Miller. In

the meantime the Miller had sounded distress signals and the Steamer Wm. G. Mather, upbound without cargo, came to her assistance a short time after the collision, and as the Miller was so damaged that she could not continue her voyage the Mather came alongside and made fast to the Miller's starboard side and accompanied her back to Lake Huron Lightship, where they were met by the Tug Oregon and Lighter Newman, which had come in answer to wireless messages from the Mather.

The Miller's anchors and windlass had been put out of commission in the collision and the Mather anchored above the Lightship with the Miller alongside, where the crew of the Glenorchy were transferred to the Oregon and taken into Sarnia, Ontario. After making some temporary repairs at Port Huron, the Miller returned to Lake Erie, go-
[fol. 4] ing to Toledo, Ohio, where the voyage was abandoned and the cargo sold.

Upon information and belief petitioner avers that said collision and resulting damage occurred without any fault or negligence on the part of its steamer Miller, or of those in charge of her navigations, but was caused by the negligence and carelessness of the steamer Glenorchy, and of those in charge of her navigation, in that she failed to observe the rules and regulations governing the navigation of vessels in fog and for the prevention of collision upon the Great Lakes, especially in respect to lookout, course and speed, compliance with passing signals and precautionary measures to avoid a collision.

4. That said collision happened and the loss, damage and injury above referred to were done, occasioned and occurred without fault on the part of this petitioner and without its privity and knowledge. Nevertheless, The Great Lakes Transportation Company, Ltd., owner of the Steamer Glenorchy and as trustee for the crew, has filed libel against the Miller in this honorable court, claiming damages on account of the loss of the Steamer Glenorchy and the loss of the crew's effects, in the sum of Six Hundred and Twenty Thousand Dollars ($620,000), and Louis Louis-Dreyfus and Charles Louis-Dreyfus, co-partners, trading under the firm name and style of Louis-Dreyfus and Company, owner of the cargo of wheat laden aboard the said Steamer Glenorchy, has filed libel against the Miller for the loss of cargo in the sum of Three Hundred Fifty Thousand Dol-

lars ($350,000.00); and your petitioner avers that the amount of these claims will far exceed the value of said Steamer Miller and her freight pending at the end of the voyage above referred to, and the value of the petitioner's interest in said Steamer and her freight pending at that time. Further, that no freight was earned inasmuch as the Miller was, herself, so damaged by reason of the collision that the voyage could not be completed and had to be abandoned.

Your petitioner desires to claim the benefit of the provisions of Sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the acts amendatory thereto and supplemetnal thereto, relating to limitation of liabiliy of vessel owners; and in this proceeding, by reason of the facts and circumstances hereinbefore set [fol. 5] forth, your petitioner further desires to contest its liability and the liability of said Steamer Miller, to any extent whatever, for any and all loss, destruction, damage and injury caused by and resulting from the collision aforesaid.

5. Petitioner further alleges that by virtue of the Limited Liability Statutes of the United States, if petitioner were to commence a cross action against the owner of the Glenorchy to recover for the damage sustained by the Miller in said collision, the owner of the Glenorchy would be permitted to limit its liability to the value of said steamer and her pending freight at the close of the voyage on which said collision occurred, and inasmuch as a result of said collision the Glenorchy became a total loss and earned no freight said limitation suit would constitute a complete bar to a recovery by petitioner in a cross action brought against the owner of the Glenorchy in this court. Consequently, petitioner claims that should it be found upon final hearing that said collision occurred as a result of fault on the part of both the Miller and Glenorchy, so that the Glenorchy cargo claimants, or other claimants not affected by the fault of the Glenorchy, are entitled to priority as against the owner of the Glenorchy, that petitioner be given the right to set off or recoup one-half of any amount recovered by the other claimants from any balance that might be due as between the two steamers in accordance with the admiralty practice of dividing losses in cases of mutual fault.

6. Your petitioner further alleges that its Steamer Miller is now within this District and that all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore your petitioner prays that this court will cause due appraisement to be had of the amount of the value of its interest in said Steamer Leonard B. Miller at the close of said voyage, no freight having been earned because of the abandonment of the voyage at Toledo, as hereinbefore stated, and will make an order for the payment of the same into court, or for the giving of a stipulation with sureties providing for the payment thereof, as ordered by the court; that the court will order a monition to issue against all persons claiming damages for any and all loss, destruction, damage or injury caused by or resulting from the collision [fol. 6] aforesaid, citing them to appear before a commissioner to be named by the court and make due proof of their respective claims at or before a certain time to be fixed by said return; also to appear and answer on oath the allegations of this petition according to law and the practice of this court, and the court issue its injunction restraining the prosecution of the aforesaid actions of The Great Lakes Transportation Company, Ltd., and Louis Louis-Dreyfus and Charles Louis-Dreyfus, and the commencement and prosecution hereafter of all and any suit or suits, action or actions, and legal proceedings of any nature or description whatever, except in the present proceeding, against petitioner and the said Steamer Miller, in respect of any claim or claims arising out of said collision; that the court in this proceeding will find that the petitioner and the said Steamer Miller are not and neither of them is liable to any extent for said loss, damage or injury, or, if it shall charge that they or either of them are liable then that the liability of the petitioner be limited to the amount of the value of its interest in said steamer and her freight pending at the close of said voyage, if there be any, and the moneys paid or secured to be paid as aforesaid, be divided pro rata among such claimants as may duly prove their claims before the commissioner heretofore referred to, saving to all parties any priority to which they may be legally entitled, or should it find that the damage resulted from mutual fault on the part of the Miller and

the Glenorchy, that there be allowed petitioner, by way of set-off or recoupment, one-half of the amount recovered by the other claimants, from any balance which may be due the claimant of the Glenorchy as set forth in article number 5 of this petition, and that petitioner may have such other and further relief in the premises as may be just.

The Columbia Steamship Company, by John T. Kelly, Its Mgr. Goulder, White & Garry, Proctors for Petitioner.

[fol. 7] *Duly sworn to by John T. Kelly. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

OPINION ON THE MERITS IN THE LIMITATION PROCEEDINGS—Filed June 5, 1926

JONES, J.:

About 2:00 o'clock on the afternoon of October 29th, 1924, the Leonard B. Miller and the Glenorchy came into collision in a fog on Lake Huron, about three or four miles below abreast of Harbor Beach, resulting in the sinking of the Glenorchy with its cargo and damage to the Miller. The Columbia Steamship Company, as owner of the L. B. Miller, filed a petition for limitation of liability. Answers were filed by the owners of the Glenorchy and by the cargo, and issue joined on the question of fault for the collision.

Both vessels were steel ships. The miller, 504 feet in length, 54 feet beam and 30 foot depth, was upbound with 9800 tons of coal; the Glenorchy, about 360 feet in length, 50 feet 2 inches beam and 30 foot depth, was downbound with a cargo of grain. The vessels were substantially on opposite courses as they approached each other and col- [fol. 8] lided almost head-on. The bow of the Miller penetrated the port bow of the Glenorchy from a point about ten feet aft of the port anchor almost to the pilot-house, and at an angle of about 2½ points. According to the evidence of the Glenorchy, she had encountered fog at 1:38 P. M.; thereupon checked her speed to one-half, which would be about five or six miles per hour, and commenced

sounding her fog whistle. At 1:45 P. M. she heard a boat whistle about dead ahead and checked her speed to dead slow. After an exchange of signals with the other boat, her engines were stopped. A few minutes thereafter the Miller was first heard and then seen six or seven hundred feet away. Her engines were then reversed to full speed astern, which was her situation when the collision occurred. The Glenorchy's course down the lake had been south by east ⅜ east, and when about one-half mile past Harbor Beach altered her course ⅜ of a point to the westward to a course of south by east. Upon exchange of fog and port to port passing signals with the approaching ship, her course was again changed to south by west. After another exchange of whistles her wheel was put to port until her course was ⅝ of a point more to starboard. The navigation of the L. B. Miller, according to her evidence, was about as follows: She encountered fog shortly after noon, or at least some time before 1:00 P. M., and continued full speed up the lake, which would be about 11¾ miles per hour; she heard the fog whistle of the downbound vessel at 1:15 P. M. about dead ahead or slightly on her port bow. Her course at that time was about north ½ west. At 1:30 P. M., when the whistles indicated that the ships were closer, she reduced her speed to one-half. About 1:45 a passing signal of one blast was given by her, which was not answered. The second passing signal of one blast was given thereafter, which was answered by the other ship, which later proved to be the Glenorchy. Shortly thereafter, she saw and heard the Glenorchy and was then given a port wheel and a full speed kick ahead. When the collision appeared to be inevitable, her engines were reversed to full speed astern.

It may well be that the navigation of both ships was substantially in accordance with the testimony of each. The difficulty and the fault would appear to have been in their inability to accurately judge the location of each other, although the evidence of both would tend to show that each [fol. 9] realized that the other was about dead ahead or a little on each other's port bow from the beginning of the signal exchanges. I think the proximate fault was the failure of each to more accurately judge the position of the other. If the position of each vessel was as testified

to by both,—dead ahead or slightly off the port bow at the time the signals were exchanged—then neither vessel ported sufficiently to effect a safe passing. If in doubt about each other's position, even after exchange of passing signals, it was the duty of the vessels to sound danger signals as an additional measure of caution. Failure to do so in this situation, under the evidence, would seem to weigh more heavily against the Glenorchy.

From the evidence, I am satisfied that the Miller was running too fast in the fog and did not check her speed in due time, in view of the signals and the knowledge which she had of the approach of another ship. While I believe that the speed of the Miller was excessive and a contributing cause of the disaster, yet I am of opinion that the combined faulty navigation of both ships produced the collision and resulting loss and damage.

A finding and judgment against both ships may be entered.

Paul Jones, United States District Judge.

June 5th, 1926.

IN UNITED STATES DISTRICT COURT

STIPULATION COVERING DAMAGES—Filed Feb. 15, 1927

Reference to the Commissioner in the above entitled cause to take testimony and ascertain and report to the Court the amount of the damages of the respective parties is hereby waived; and

It is hereby stipulated by and between all the parties that the damages are as follows:

[fol. 10] 1. Damages sustained by Louis-Dreyfus & Company, owner of the cargo of wheat laden aboard the Steamer Glenorchy at the time of the collision and which by reason of said collision became a total loss, 208,392-40/60 bushels at $1.54-3/4 per bushel, $322,487.65.

2. Damages sustained by Great Lakes Transportation Company, Ltd., owner of the Steamer Glenorchy, which by reason of said collision became a total loss, $250,000.00.

3. Damage sustained by Great Lakes Transportation Company, Ltd., as trustee for John Scott, a member of the crew of the Glenorchy who sustained personal injuries in said collision, $334.34.

No intervening claim was ever filed in this proceeding on account of said claim, but the Great Lakes Transportation Company, Ltd., having effected settlement with Scott whereby it paid him the sum of $334.34, it is agreed by and between the parties that in the entering of final decree said claim is to be included as if originally filed.

4. Damages sustained by The Columbia Steamship Company, as owner of the Steamer Leonard B. Miller:

Repairs to the Miller, including wreckage, salvage expense and general average sacrifices, and expenditures incurred on behalf of hull, cargo and freight		$118,091.26
Loss of use during detention on account of said collision	$28,082.94	
Less loss of freight of collision trip allowed in general average	3,941.12	
		24,141.82
Total		$142,233.08

Louis-Dreyfus and Charles Louis-Dreyfus, Copartners, Trading under the Firm Name and Style of Louis-Dreyfus & Company, by Bigham, Englar & Jones, Their Proctors. Great Lakes Transportation Company, Ltd., by Holding, Duncan & Leckie, [fol. 11] Its Proctors. Great Lakes Transportation Company, Ltd., Trustee for John Scott, by Holding, Duncan & Leckie, Its Proctors. The Columbia Steamship Company, by Goulder, White and Garry, Its Proctors.

Dated this 14th day of February, 1927.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO FILE AFFIDAVIT OF JAMES T. IRVING—December 11, 1928

On application of James M. McSweeney and Messrs. Duncan and Mount, proctors for Standard Marine Insur-

ance Company, Ltd., and consent of Messrs. Bigham, Englar & Jones and Messrs. Day & Day, proctors for Scottish Metropolitan Assurance Company, Ltd., leave is hereby granted said proctors for Standard Marine Insurance Company, Ltd., to file the affidavit of James T. Irving as part of the record of this case, and said affidavit is accordingly filed.

IN UNITED STATES DISTRICT COURT

ORIGINAL AFFIDAVIT OF JAMES T. IRVING—Filed Dec. 11, 1928

CANADA,
Province of Manitoba, to wit:

I, James T. Irving, of the City of Winnipeg, in the Province of Manitoba, do solemnly declare:

1. That I am the Assistant-Secretary of the Winnipeg Grain Exchange, situate in the City of Winnipeg, in the Province of Manitoba, and as such have a full knowledge of the facts herein set out.

[fol. 12] 2. That on the 27th day of October, A. D. 1924, the official records of the Winnipeg Grain Exchange for wheat for October delivery, basis in store Fort William or Port Arthur were as summarized hereunder:

Opening price range	$1.54 @ $1.54½	per bushel
High price	$1.55¼	per bushel
Low price	$1.53½	per bushel
Closing price	$1.54¾	per bushel

3. That these are prices for wheat basis in store Fort William or Port Arthur.

And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of The Canada Evidence Act.

J. T. Irving.

Declared before me at the City of Winnipeg, in the Province of Manitoba, this 19th day of November, A.D. 1926. Rob't I. Campbell, a notary public in and for the Providence of Manitoba. (Seal.)

In United States District Court

Final Decree on the Merits in Limitation Proceedings—February 15, 1927

The petition and libel of The Columbia Steamship Company having been filed in this Court, showing that it was the owner of the Steamer Leonard B. Miller, which steamer and the Steamer Glenorchy were in collision on Lake Huron on the afternoon of October 29th, 1924, resulting in the total loss of said Steamer Glenorchy and her cargo and [fol. 13] serious damage to the Miller, and petitioner having claimed that any loss, damage, injury or destruction was occasioned without its privity and knowledge, and that it desired to claim the benefits of a limitation of liability under Sections 4283-4285 of the Revised Statutes of the United States and the Acts amendatory thereof and supplemental thereto, and also contest any and all liability in respect to said collision and loss and damage arising therefrom independent of the limitation statutes; and an order of court having been made for an appraisal of petitioner's interest in said steamer at the termination of said voyage (no freight having been earned on said voyage), and said appraisal having been made and the value of petitioner's interest having been fixed in the sum of $424,830.50, and stipulation for such appraised value and interest with the Hartford Accident & Indemnity Company, as surety, having been filed; and an order having been made directing a monition to be issued, citing all persons claiming damages on account of said collision to appear before this Court and make due proofs of their respective claims, with liberty also, upon making proof, to answer said petition and libel, and that said monition having been duly served and published in conformity with the direction of said order; and a report having been made by William B. Wood, Comsioner appointed to hear claims, showing the following claims as having been filed in proper time:

Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners, trading under the firm name and style of Louis-Dreyfus & Company, owners of the cargo laden aboard the Glenorchy at the time of the collision;

Great Lakes Transportation Company, Ltd., owner of the Steamer Glenorchy at the time of said collision;

and said claimants also having filed answers to the libel and petition of The Columbia Steamship Company, the answer of the Great Lakes Transportation Company, Ltd., owner of the Steamer Glenorchy, alleging among other things that as a result of said collision the Glenorchy became a total loss and was entitled to a limitation of its liability; and petitioner, The Columbia Steamship Company, having filed reply to said answers, containing a prayer that if it should be found that said collision occurred as a result of mutual fault on the part of the Miller [fol. 14] and the Glenorchy, that it be permitted to urge its liability to the claimant of the Glenorchy's cargo by way of set-off or recoupment in reduction of its liability to the owner of the Glenorchy so that a balance might be struck between the Glenorchy's damage and the Miller's damage in accordance with the admiralty practice of dividing losses between vessels guilty of mutual fault; and said cause having come on for hearing before this Court it was stipulated by the proctors for the respective parties in open court that both the petitioner, The Columbia Steamship Company, as owner of the Miller, and claimant, Great Lakes Transportation Company, Ltd., as owner of the Glenorchy, were entitled to a limitation of liability; and the Court having examined the pleadings and having heard the proofs of the parties and having considered the arguments of counsel, and due deliberation having been had, an opinion was filed wherein it was found that both of said vessels, to wit, the Leonard B. Miller, and the Glenorchy, were guilty of faults contributing to the collision, and that the damages should be divided accordingly; and it further appearing from stipulation on file in this Court that the parties have agreed upon the damages and accordingly making it unnecessary to refer the matter of damages to the Commission, said stipulation also providing that the Great Lakes Transportation Company, Ltd., as trustee for John Scott, a member of the crew of the Glenorchy, sustained damage in the sum of $334.34 on account of personal injuries resulting from said collision, and that although no claim was ever filed in this proceeding on account of said claim, it should be included in the final decree as though it had been originally filed.

Now, therefore, it is ordered, adjudged and decreed that said collision and the losses and damages arising there-

from were due and occasioned without the privity or knowledge of petitioner, The Columbia Steamship Company, or claimant, Great Lakes Transportation Company, Ltd., and that said The Columbia Steamship Company, as owner of the Steamer Leonard B. Miller, and the Great Lakes Transportation Company, Ltd., as owner of the Glenorchy are entitled to the benefits of the limitation of liability provided for in Sections 4283-4285 of the Revised Statutes of the United States and the Acts and Statutes amendatory thereof and supplemental thereto; and it further appearing that no other claims having been filed against the Steamer Leonard B. Miller or the Steamer Glenorchy, or [fol. 15] their owners, and that the time for presenting such claims has expired, it is ordered that all persons or corporations, their agents, servants, proctors and attorneys, except the parties to this proceeding, now having or pretending to have any claim or claims against said steamers or their owners, or either of them, arising out of, occasioned by or resulting from the collision on the 29th day of October, 1924, are hereby perpetually restrained and enjoined from the institution or prosecution of any and all suits in respect of such claim or claims;

It is further ordered, adjudged and decreed that the damages caused by said collision between the Steamer Leonard B. Miller and the Steamer Glenorchy, described and referred to in the pleadings in this cause, were occasioned by the mutual fault of said steamers, and that said damages are to be divided equally between the owners of said steamers, the amounts of said damages as stipulated by the parties being as follows:

Louis Louis-Dreyfus and Charles Louis-Dreyfus, co-partners, trading under the firm name and style of Louis-Dreyfus & Company, owner of the cargo on the Glenorchy	$322,487.65
Great Lakes Transportation Company, Ltd., owner of the Steamer Glenorchy	250,000.00
Great Lakes Transportation Company, Ltd., trustee for John Scott	334.34
The Columbia Steamship Company, owner of the Steamer Leonard B. Miller	142,233.08
Total Damages	$715,055.07

It is further ordered, adjudged and decreed that the claim of Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners, trading under the firm name and style of Louis-Dreyfus & Company, owner of the cargo laden aboard the Steamer Glenorchy at the time of said collision and total loss thereby amounting to the sum of $322,487.65, and the claim of Great Lakes Transportation Company, Ltd., as trustee for John Scott, amounting to $334.34, are entitled to priority of payment out of the fund, secured herein by the stipulation, for value filed by petitioner, The Columbia Steamship Company, in this cause over the other claim [fol. 16] herein mentioned and specified in the stipulation on damages; and

It is further ordered, adjudged and decreed that said Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners, trading under the firm name and style of Louis-Dreyfus & Company, as owner of the cargo laden aboard said steamer Glenorchy at the time of said collision, and Great Lakes Transportation Company, Ltd., trustee for John Scott, do have and recover from petitioner, The Columbia Steamship Company, and the Hartford Accident & Indemnity Company, as surety on its stipulation, for value in the said several sums hereinbefore found to be due them, together with interest thereon at the rate of 5 per cent per annum from October 29th, 1924, until the same shall be paid, and that the said sums may be paid to their proctors of record in this case and their receipt accepted for the same as final; and it appearing further to the Court that inasmuch as both the Miller and the Glenorchy were at fault and that the amount of damage herein decreed against petitioner, The Columbia Steamship Company, together with the Steamer Leonard B. Miller's own damage, exceeds the damages sustained by claimant, Great Lakes Transportation Company, Ltd., on account of the loss of its Steamer Glenorchy, so that in order to equalize the loss between the parties the balance of recovery would be in favor of petitioner, The Columbia Steamship Company, against claimant, Great Lakes Transportation Company, Ltd., but for the fact that the Glenorchy was a total loss, and that under the right of her owner, Great Lakes Transportation Company, Ltd., to limit its liability, its responsibility for such balance is extinguished:

Now, therefore, it is further ordered, adjudged and decreed that petitioner, The Columbia Steamship Company, shall have the right of set-off and recoupment of the amounts herein decreed against it to the other claimants, together with its own damage, against the damage sustained by claimant, Great Lakes Transportation Company, Ltd., on account of the total loss of the Steamer Glenorchy, and as the aggregate of the former amounts exceeds the later amounts, there can be no affirmative recovery by claimant, Great Lakes Transportation Company, Ltd., as owner of the Glenorchy, against petitioner, The Columbia Steamship Company, and its claim for an affirmative re- [fol. 17] covery on account of the loss of the Steamer Glenorchy is hereby denied.

It is further ordered, adjudged and decreed that the costs on the proceeding for limitation of liability to be taxed be paid by petitioner, The Columbia Steamship Company, and that all other costs to be taxed be equally divided between said The Columbia Steamship Company and the Great Lakes Transportation Company, Ltd.

It is further ordered, adjudged and decreed that if the said several sums, together with the costs shall not be paid, or proceedings thereon taken to appeal within the time limited by law, that each of said claimants entitled to receive any of the sums hereinbefore decreed to be paid, or the costs, shall have execution against The Columbia Steamship Company and the Hartford Accident & Indemnity Company for the whole thereof or so much thereof as may at any time remain unpaid, together with the costs incurred thereby.

Approved as to form:

Bigham, Englar & Jones, Proctors for Louis Louis-Dreyfus and Charles Louis-Dreyfus, Copartners, Trading under the firm name and style of Louis-Dreyfus & Company. Holding, Duncan & Leckie, Proctors for Great Lakes Transportation Company, Ltd., as owner of the Steamer Glenorchy. Holding, Duncan & Leckie, Proctors for Great Lakes Transportation Company, Ltd., as Trustee for John Scott. Goulder, White & Garry, Proctors for The Columbia Steamship Company.

[fol. 18] IN UNITED STATES DISTRICT COURT

AMENDED PETITION OF INTERVENTION OF STANDARD MARINE INSURANCE COMPANY, LTD.—Filed April 23, 1927

The amended petition of Standard Marine Insurance Company, Ltd., intervening for its interest, by subrogated rights, in the fund in court in the above entitled cause, represented by the bond or stipulation for value of the S/S Leonard B. Miller, filed therein, respectfully alleges upon information and belief, as follows:

First. At all the times hereinafter mentioned, your petitioner, Standard Marine Insurance Company, Ltd., was and it still is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain, having an office and place of business in the Dominion of Canada, at 64 King Street East, City of Toronto, and it was at all the times hereinafter mentioned and still is engaged in the insurance business.

Second. On or about July 12, 1924, your petitioner, Standard Marine Insurance Company, Ltd., issued its open policy of marine insurance No. 1010, wherein and whereby it insured Louis-Dreyfus & Company against perils of the Lakes and other enumerated perils on grain owned by the said assured or in which the said assured might have an interest, at and from port or ports on the Great Lakes, to other port or ports on the Great Lakes, commencing with shipments made after midnight, June 10, 1924, and up to and including all vessels sailing prior to midnight, December 12, 1924.

The amount of said insurance effective from August 1, 1924, as provided by endorsement attached to the said policy on August 1, 1924, was as follows:

"To cover increased value on grain owned by the assured or in which the assured may have an interest, such increased value for the purposes of this insurance to be arrived at by taking the difference between the c.i.f. invoice cost and the highest market value per bushel, plus 5¢ (five cents) as set out in the New York Journal of Commerce between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at

destination as named in the certificate, both days inclusive; and in the event of casualty to be valued at the difference between the c.i.f. invoice cost and the highest market value [fol. 19] per bushel, plus 5¢ (five cents as set out in the New York Journal of Commerce between the day of sailing of the vessel at point of shipment and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive."

A copy of the said policy of insurance is hereto annexed, marked Schedule "A" and is made a part of this petition.

Third. The said Louis-Dreyfus & Company, the assured under the above mentioned policy of marine insurance, shipped or caused to be shipped 200,000 bushels of wheat on the S/S Glenorchy at Port Arthur, Canada, on October 27, 1924, bound for Port Colborne, Canada. The said shipment of wheat was covered by the policy of marine insurance above referred to on the said voyage from Port Arthur to Port Colborne against perils of the Lakes.

On October 29, 1924, during the pendency of the said insurance and while the said wheat was on board the S/S Glenorchy, the said steamship and cargo sank in collision with the steamer Leonard B. Miller, and both the S/S Glenorchy and her said cargo became a total loss.

Fourth. By reason of the said total loss of the said cargo of wheat your petitioner, Standard Marine Insurance Company, Ltd., became liable to pay and did pay to the said Louis-Dreyfus & Company, the sum of $62,500, the amount of said insurance.

Fifth. In the above entitled proceedings for limitation of liability, instituted by Columbia Steamship Company, as owner of the steamer Leonard B. Miller, to limit liability for damage claims arising out of the collision above mentioned, this Court has held that the said collision between the steamship Glenorchy and the steamer Leonard B. Miller was due to the faults of both vessels, and by final decree entered in these proceedings on or about February 15, 1927, has ordered, adjudged and decreed that Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners, trading under the firm name and style of Louis-Dreyfus & Company, as owners of the cargo laden on board the said S/S Glenorchy

at the time of said collision, have and recover from the peitioner, the Columbia Steamship Company and the Hartford Accident & Indemnity Company, as surety on its stipulation for value, the sum of $322,487.65, (of which the sum [fol. 20] of $309,500 was for the 200,000 bushels of wheat hereinbefore referred to), together with interest thereon at the rate of five (5) per cent per annum from October 29, 1924, until the same shall be paid, and that the said sum may be paid to the proctors of record of the said Louis Louis-Dreyfus and Charles Louis-Dreyfus, trading under the firm name and style of Louis-Dreyfus & Company in this case, and their receipt accepted for the same as final.

Sixth. The said Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners, doing business at Louis-Dreyfus & Company, had other insurance on the said 200,000 bushels of wheat, placed with Scottish Metropolitan Insurance Company, which other insurance also covered the said cargo against perils of the Lakes on the voyage in question, and as a result of said collision, and loss the said Scottish Metropolitan Insurance Company paid under its policy to the said Louis-Dreyfus & Company, the sum of $284,000 on account of the loss of the said 200,000 bushels of wheat.

Seventh. By reason of the premises, the said Scottish Metropolitan Insurance Company and your petitioner, Standard Marine Insurance Company, Ltd., were co-insurers of the said 200,000 bushels of the said cargo, and by subrogation are entitled to have the said sum of $309,500 (being that part of the $322,487.65 decreed by said final decree of February 15, 1927 to be paid by the Columbia Steamship Company to Louis-Dreyfus & Company, which represents the value of said 200,000 bushels of wheat) divided pro rata between them in the proportion of the payments made by them to the said Louis-Dreyfus & Company under their respective policies.

The claim filed in these limitation proceedings in the name of Louis-Dreyfus & Company was in fact filed in their name by Scottish Metropolitan Insurance Company and the latter's proctors appear as proctors of record for Louis-Dreyfus & Company. Any and all money awarded by the said final decree to Louis Dreyfus & Company, will, in fact,

be paid to the said proctors of record of Louis-Dreyfus & Company, who are in fact proctors for the said Scottish Metropolitan Insurance Company. The said Scottish Metropolitan Insurance Company and their said proctors have refused to recognize the right of your petitioner, Standard Marine Insurance Company, Ltd., to a pro rata [fol. 21] share of such payment, and have claimed that your petitioner, Standard Marine Insurance Company, Ltd., is only entitled to the surplus in the said $309,500 remaining after the Scottish Metropolitan Insurance Company has been paid $284,000 in full. Such disposition of the amount decreed to be paid to Louis-Dreyfus & Company under the final decree of February 15, 1927, would result in your petitioner receiving only approximately the principal sum of $25,500, whereas your petitioner is informed and believes and therefore alleges that it is legally entitled to its pro rata share of the said $309,500, which pro rata share would amount to a principal sum in excess of $56,000.

Eighth. No payment has as yet been made under said final decree of February 15, 1927 in these limitation proceedings.

Ninth. All and singular the foregoing premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore your petitioner prays that the said Louis Louis-Dreyfus and Charles Louis-Dreyfus, co-partners trading under the firm name and style of Louis-Dreyfus & Company, be required to answer the allegations of this petition, and that this Court determine the respective rights of the said Scottish Metropolitan Insurance Company and your petitioner to the said award of $309,500 to be paid by Columbia Steamship Company and/or its stipulator and/or its surety on its stipulation for value, and that this Court enter an order herein directing the said Columbia Steamship Company and/or its surety the said Hartford Accident & Indemnity Company, to pay to your petitioner, Standard Marine Insurance Company, Ltd., its pro rata share of the said sum of $309,500, with interest thereon at the rate of five (5) per cent per annum from October 29, 1924, as may be determined by this Court after full hearing of the issues raised by this petition, and that

your petitioner may have such other and further relief as may be just in the premises.

James M. McSweeney, Guarantee Title Building, Cleveland, Ohio. Duncan & Mount, 27 William Street, New York City, New York, Proctors for Petitioner.

[fol. 22] *Duly sworn to by A. B. Pakenham. Jurat omitted in printing.*

[fol. 23] SCHEDULE "A" TO AMENDED PETITION OF INTERVENTION

Copy

Lake Cargo. No. 1010

Standard Marine Insurance Company, Limited, of Liverpool, England

A. B. Pakenham, Toronto Insurance & Vessel Agency, Ltd., 64 King St. East, Toronto, Canadian Agent

By this policy of insurance on account of Louis-Dreyfus & Company.

Loss, if any, payable to the assured or order.

(This Company not to be liable for more than $50,000 "Increased Value", $100,000 Other shipments per any one vessel, or in any one place, at any one time.

Warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction, and the consequences thereof, or of any attempt thereat and also from all consequences of riots, civil commotions, insurrections, hostilities or warlike operations, whether before or after declaration of war; and whether lawful or unlawful; and whether by the act of any belligerent nations, or by governments of seceding or revolting states, or by unauthorized or lawless persons therein, or otherwise; and whether occurring in a port of distress or otherwise.)

[Sum Insured, As agreed.]

[Premium, As agreed.]

Do make insurance, and cause the several persons indorsed hereon, or in the books attached hereto, to be insured upon all kinds of Lawful Goods, Wares, Merchandise and Produce, laden on board the good Vessel or Vessels, Boat or Boats, Railroad or Carriage, Lost or Not Lost, at and from ports and places to ports and places on a lawful and regular route and voyage, for the several amounts, and at the rates as hereon indorsed, subject to the conditions of this Policy, or of any Contract Proposition covered by this Policy, according to their true intent and meaning.

Beginning the adventure upon the said property from and immediately following the loading thereof at the port or place named in the endorsement, and so shall continue and endure until the same shall arrive and be safely landed at the port of destination, and not to exceed forty-eight hours from the time of arrival.

[fol. 24] Touching the adventures and perils which this Company is contented to bear and take upon itself, they are of the Lakes, Rivers, Canals, Railroads, Fires, Jettisons, and all other perils or misfortuntes that have or shall come to the hurt, detriment, or damage of the said property or any part thereof, excepting all perils, losses or misfortunes arising from the want of ordinary care and skill in loading and stowing the cargo of, or in navigating the said vessel, from theft, barratry or robbery, or other legally excluded causes. And in case of loss or misfortune, it shall be lawful and necessary to and for the insured or insurer, their agents, factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the said goods and merchandise, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability under this Policy, but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party; to the charges whereof the said Company will contribute in such proportion as the sum herein insured bears to the whole value of the property so insured. Moneys and Bullion, Promissory Notes, and other evidences of debt, Books of Accounts, Written Securities, Deeds or other evidences of

title to property of any kind, are not covered by this Policy, unless expressly defined as so insured.

And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in said property are furnished this Company. Provided always, and it is hereby further agreed, that if the said insured shall have made any other insurance upon the property aforesaid, prior in date to this policy, then this Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured; and this Company shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said Property, subsequent in date to this Policy, this Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same man-[fol. 25] ner as if no subsequent insurance had been made. Warranted that any insurance granted herein shall not cover where the assured or any carrier or other bailee has insurance which would attach, if this policy had not been issued. And in case of loss or damage to the property hereby insured, this Company, its agent or representative at or nearest the first port of discharge shall have prompt notice of same, and shall have every opportunity and facility for ascertaining the cause, extent and amount of damage, by personal inspection, appraisal, or sale of the damaged property. It is also agreed, that the property be warranted by the insured free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war. It is furthermore hereby expressly provided, that no suit or action against this Company, for the recovery of any claim for loss or damage upon, under or by virtue of this Policy, shall be sustained in any Court of Law or Equity, unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur; and in case any such suit or action, shall be commenced after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken

and deemed as conclusive evidence and a conclusive defence against the validity of the claim thereby so attempted to be enforced.

This insurance warranted to be in all cases null and void as concerns loss or damage from fire on land to the extent of any fire insurance directly or indirectly covering upon the same property, whether prior or subsequent hereto in date, and it is also understood and agreed, that in case any agreement be made or accepted by the assured with any carrier by which it is stipulated that such or any carrier shall have, in case of any loss for which he may be liable, the benefit of this insurance, or exemption in any manner from responsibility grounded on the fact of this insurance, then and in that event the insurer shall be discharged of any liability for such loss hereunder, but this policy in these and all cases of loss or damage by perils insured against shall be liable and owe actual payment for (only) what cannot be collected from carrier and/or bailee and/or fire insurers of property lost or damaged, as before stated, but in case of final failure to collect from carrier and/or bailees and/or fire insurers, this policy shall be duly liable, pro- [fol. 26] vided always the loss shall constitute in other respects a claim under this insurance, and in the event of loss or damage, this policy shall be null and void to the extent of any payment made by any carrier or bailee, liable or not, or any payment made by any party in purchase of a claim hereunder, any assignment whatever given by the assured to the contrary notwithstanding.

It is also understood and agreed, that in case of loss or damage under this policy, the assured, in accepting payment therefor, thereby and by that act assigns and transfers to this company all his or their right to claim for loss or damage, as against the carrier or other person or persons, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by this Company; and any act of the Insured, waiving or transferring, or tending to defeat or decrease any such claim against the carrier, or such other person or persons, whether before or after the insurance was made under this Policy, shall be a cancellation of the liability of this Company, for or on account of the risk for which loss is claimed.

And it is understood and agreed, that this Company, or its Agent, shall have free access, at all reasonable hours, to

the books, accounts, instructions and correspondence of the assured, containing statements of, or which relate to shipments and receipts covered by this Policy; and this Policy may be declared void by either party, on giving a written notice to that effect to the other party; but without prejudice to any shipment or liability made or incurred prior to the service of such notice.

Deck Cargoes. It is understood that property covered by this Policy on Lake Vessels, shall be under deck, unless otherwise specified and charged for additionally in the endorsement hereon; and deck cargoes are insured against total loss of packages only; the minimum rates of such loss to make a claim shall be ten per cent., except salt, which shall be twenty per cent. of the whole number of packages insured on deck; and in all cases on deck risks to be free from damage by wet, breakage, leakage, or exposure.

Warranted by the insured free from damage or injury from dampness or frost, heating, sweating, steaming, change of flavor, or being spotted, discolored, musty, or [fol. 27] mouldy, except caused by actual water contact with the article damaged, and to be free from liability for leakage on molasses or other liquids, or breakage of articles liable to break from their own nature, unless occasioned by the perils insured against.

If the voyage aforesaid shall have begun, and shall have terminated before the date of this Policy, then there shall be no return of premium on account of such termination.

No shipment to be considered as insured until approved and endorsed hereon by a representative of the Company.

It is understood and agreed, as one of the conditions under which this Policy is issued and endorsements made hereon, that if the insurance is procured by any person or persons other than the assured, they shall be deemed the agent or agents of the Assured and not of this Company in any and all transactions relating to this insurance.

This policy is subject to the usages and regulations of the Ports of Chicago or New York, in all matters of adjustment and settlement of losses and averages not herein otherwise clearly specified and provided for, as may be stated by a competent distinterested adjuster of marine losses, to be designated by the insurers; but no partial loss or particular average to be paid unless amounting to Five Per Cent.

In witness whereof the undersigned on behalf of the said company has hereunto set his hand in Toronto the Twelfth day of July, 1924.

Standard Marine Insurance Company, Ltd., Toronto Insurance & Vessel Agency, Ltd., A. B. Pakenham, Director, Canadian Agent.

Standard Marine Insurance Co., Ltd.

Endorsement to be Attached to and Made Part of Policy No. 1010, Issued to Louis Dreyfus & Company

Clause No. 3 of this policy is hereby altered to read as follows, from the date hereof:

To cover "Increased Value" on grain owned by the Assured or in which the Assured may have an interest, such "Increased Value" for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice and the highest market value per bushel, plus 5¢ [fol. 28] (Five cents), as set out in the "New York Journal of Commerce" between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the Certificate, both days inclusive; and in the event of casualty, to be valued at the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five cents) as set out in the "New York Journal of Commerce" between the day of sailing of the vessel at point of shipment, and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. Advice of all such shipments to be mailed to the Company, 64 King Street East, Toronto, Ontario, Canada, by registered letter on day of sailing of the vessel, or as soon thereafter as practicable.

Standard Marine Insurance Company, Ltd., ——, Attorney. (Seal.)

Toronto, August 1st, 1924.

Standard Marine Insurance Co., Ltd.

Endorsement to be Attached to and Made Part of Policy No. 1010, Issued to Louis Dreyfus & Company

Notwithstanding anything contained herein to the contrary, it is understood and agreed that the limit under this

policy is increased to cover as of all shipments on vessels sailing after midnight August 27th, 1924, an amount not exceeding $150,000 (One hundred and fifty thousand dollars) on increased value by any one steamer, or not exceeding $150,000 (One hundred and fifty thousand dollars) on basic risk by any one steamer, but in no case exceeding $150,000 (One hundred and fifty thousand dollars) combined increased value and basic risk by any one steamer.

All other terms and conditions remaining unchanged.

Standard Marine Insurance Company, Ltd., ——
——, Attorney. (Seal.)

Toronto, November 4th. 1924.

Standard Marine Insurance Co., Ltd.

Endorsed to be Attached to and Made Part of Policy No. 1010, Issued to Louis Dreyfus & Company

[fol. 29] Notwithstanding anything contained herein to the contrary, it is understood and agreed that the limit under this policy is increased, as of all shipments on vessels sailing after midnight November 3rd, 1924, to an amount not exceeding $400,000 (Four Hundred thousand dollars) on increased value on any one iron or steel steamer, or $400,000 (Four hundred thousand dollars) on basic risk by any one iron or steel steamer, but in no case to cover an amount in excess of $400,000 (Four hundred thousand dollars) combined increased value and basic risk by any one iron or steel steamer.

All other terms and conditions remaining unchanged.

Standard Marine Insurance Company, Ltd., ——
——, Attorney. (Seal.)

Toronto, November 4th. 1924.

Standard Marine Insurance Co., Ltd.

Endorsement to be Attached to and Made Part of Policy No. 1010, Issued to Louis Dreyfus & Company.

This Policy is altered as from inception to cover shipments termed "Increased Values Only" and not basic risks, as per the following clauses:

It is understood and agreed that this Company waives its right to participate in any salvage realized from the sale of damaged grain.

Notwithstanding anything contained in this policy and/or certificates issued hereunder, it is wararnted by the assured that this policy and/or certificates issued hereunder, is free from General Average, Salvage and Special Charges excepting in the case of contributory value over the original amount insured.

All other terms and conditions remaining unchanged.

Standard Marine Insurance Company, Ltd., ——
——, Attorney. (Seal.)

Toronto, November 4th. 1924.

[fol. 30] Copy

Standard Marine Insurance Co., Ltd.

Schedule Attached to and Forming Part of Policy No. 1010

1. To Louis-Dreyfus & Company.

2. For account of themselves; loss, if any, payable to their order.

3. To cover "Increased Value" on grain owned by the Assured or in which the Assured may have an interest, such "Increased Value," for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the market value per bushel as set out in the "New York Journal of Commerce" on the date of sailing of the vessel, plus 5¢ (Five Cents) per bushel added thereto: Advices of all such shipments to be mailed to the Company, 64 King Street East, Toronto, Ontario, Canada, by registered letter on date of sailing of the vessel, or as soon thereafter as practicable.

4. To cover all shipments of grain owned by the Assured, or in which the Assured may have an interest and not insured by the Shipper, such shipments to be valued for the purposes of this insurance, at amount declared, such amount declared and advices of such shipments to be mailed to the Company, 64 King Street, East, Toronto, Ontario, Canada, by registered letter prior to sailing of the vessel.

5. It is understood and agreed that this Policy is not liable for an amount in excess of $50,000 (Fifty thousand dollars) on 'Increased Value," and $100,000 (One Hundred thousand dollars) on other shipments by any one vessel at

any one time, unless accepted by the Company in writing prior to sailing of the vessel, and before known or reported loss.

6. This policy attaches to and covers 100% (One hundred per cent) of all shipments insured hereunder.

7. This policy, and all insurance taken under it, to be subject to amendment to conform to any and all instructions sent by the Underwriters interested hereunder from time to time.

8. Per steamer and/or steamers classed for the carriage of grain in the American Bureau of Shipping Great Lakes [fol. 31] Handbook for the year 1924, including transshipment, if any.

9. At and from port or ports on the Great Lakes to other port or ports on the Great Lakes and St. Lawrence River as far East as Montreal, commencing with shipments made after Midnight June 10th, 1924, and to continue up to and including all vessels sailing prior to Midnight, December 12th, 1924.

10. It is understood and agreed that the termination of this policy by its terms on December 12th, 1924, shall not affect risks on grain involving winter storage at port of destination, such risks to be held covered until discharged; or on grain shipped under bill of lading involving winter storage at port of shipment together with the first trip down in the Spring, such risks to be held covered until arrival at Lake destination.

11. At the request of the Assured it is agreed that certificates under this policy shall cover against "All damage resulting from faults or errors in navigation, or in the management of the vessels," from which vessels

/and . . . . .

Copy.

Schedule attached to Policy
No. 1010 . . . . . Page Two.

(11. cont'd.) and/or their Owners, Agents or Charterers are relieved of responsibility by the clause in Section 3 of the so-called Harter Act from which the above quoted words are literally extracted, but nothing in this agreement shall be construed to render the Assurers liable under any cir-

cumstances for any loss or damage due to the Vice Propre of the grain itself; other conditions remaining unchanged.

12. This policy shall not be vitiated by any unintentional error in description of voyage or interest, or by deviation, provided same be communicated to the Assurers as soon as known to the Assured and an additional premium paid if required.

13. Held covered until discharged from the vessel for a period of not exceeding 18 (eighteen) days after arrival. For the time exceeding 72 (Seventy-two) hours an additional premium pro rata of the fifteen day tariff rate shall be paid by the original insured.

14. It is hereby understood and agreed that risks on grain while in elevators in no case are to be covered hereunder.

[fol. 32] 15. The rates and premiums under this contract are to be in accordance with the rates agreed in writing and based upon a book and/or table of classification of vessels to be furnished by the Assurers, both said rates and table of classification of vessels to be considered as part of this contract.

16. Premiums payable monthly in cash.

17. Premiums and losses payable in United States funds or equivalent.

18. Attached to and forming part of Standard Marine Insurance Company Limited Policy No. 1010.

Standard Marine Insurance Company, Ltd. Toronto Insurance & Vessel Agency, Ltd., A. B. P., Director, Canadian Agent. (Seal.)

Toronto, July 12th, 1924.

IN UNITED STATES DISTRICT COURT

ANSWER OF SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD., TO THE AMENDED PETITION—Filed June 16, 1927

The answer of Scottish Metropolitan Assurance Company, Limited, to the amended petition of Standard Marine

Insurance Company, Limited, in the above proceeding, alleges upon information and belief as follows:

First. Claimant admits the allegations contained in article "First" of said petition.

Second. Claimant denies each and every allegation contained in article "Second" of said petition, except as the same are hereinafter specifically admitted or modified in this answer.

[fol. 33] Third. Claimant admits that on or about October 27, 1924, Louis Dreyfus & Company caused to be shipped 200,000 bushels of wheat on the S. S. "Glenorchy" at Port Arthur, Canada, and admits that on or about October 29, 1924, the S. S. "Glenorchy" and the said cargo of wheat became a total loss, and denies each and every other allegation contained in article "Third" of said petition.

Fourth. Claimant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article "Fourth" of said petition and therefore puts the petitioner to the proof of said allegations.

Fifth. Claimant admits the allegations contained in article "Fifth" of said petition.

Sixth. Claimant admits that the said Louis Dreyfus and Charles Louis Dreyfus, copartners doing business as Louis Dreyfus & Company, had placed insurance on the said 200,000 bushels of wheat with this claimant, Scottish Metropolitan Assurance Company, Limited, and that said insurance covered this cargo against perils of the lakes on the voyage in question and that as a result of said collision and the subsequent loss of said cargo, this claimant, Scottish Metropolitan Assurance Company, became obligated to pay, and did pay, to the said Louis Dreyfus & Company the sum of $284,000, on account of the total loss of the said 200,000 bushels of wheat, and denies each and every other allegation of Article Sixth of said petition.

Seventh. Claimant denies each and every allegation contained in article "Seventh" of said petition, except that it admits that this claimant and its proctors refuse to recog-

nize the right of the petitioner, Standard Marine Insurance Company, Limited, to a pro rata share of any payments made in this proceeding on account of the loss of the aforesaid 200,000 bushels of wheat, and that this claimant maintains that the Standard Marine Insurance Company, Limited, is only entitled to the surplus in said recovery remaining after this claimant, Scottish Metropolitan Assurance Company, Limited, has been paid the sum of $284,000 with interest.

Eighth. Claimant admits the allegations contained in article "Eighth" of said petition.

Ninth. Claimant admits the Admiralty and Maritime [fol. 34] jurisdiction of the United States and of this Honorable Court, and denies each and every other allegation contained in article "Ninth" of said petition.

Further answering the aforesaid petition, claimant alleges that the true facts and circumstances attending these matters are as follows:

Tenth. On or about February 22, 1924, your claimant, Scottish Metropolitan Assurance Company, Limited, issued its open policy of marine insurance No. L100023 to Alberta Cooperative Wheat Producers, Limited, and that on or about September 10, 1924, said policy of insurance was endorsed over, with the consent of said Alberta Cooperative Wheat Producers, Limited, and with the consent of your claimant, Scottish Metropolitan Assurance Company, Limited, to the Canadian Cooperative Wheat Producers, Limited. This insurance, as provided by endorsement attached to the said policy dated October 9, 1924, was as follows:

"To cover 100% interest in all shipments of grain and/or flaxseed and/or cereals and/or maize, their own, or in which they may have an insurable interest, or the property of others which they may receive instructions to insure, such instructions being mailed or given the Canadian Co-Operative Wheat Producers, Limited, in writing, prior to shipment and before any known or reported loss or accident."

"All other terms and conditions remaining unchanged."

Eleventh. Under contract dated August 25, 1924, Louis Dreyfus & Company purchased from the Canadian Co-Operative Wheat Producers, Limited, 200,000 bushels of Manitoba No. 2 Northern Wheat for future delivery at Montreal, Canada, the invoices covering said purchase being dated October 28, 1924. Thereafter, on or about October 27, 1924, the said Canadian Co-Operative Wheat Producers, Limited, shipped the said 200,000 bushels of wheat from Port Arthur and Fort William, Canada, on the S. S. "Glenorchy" for delivery at Montreal.

Twelfth. On October 28, 1924, your claimant, Scottish Metropolitan Assurance Company, Limited, issued under its open policy No. L100023 to the Canadian Co-Operative Wheat Producers, Limited, two certificates of insurance numbered respectively A15017 and A15018, each covering 100,000 bushels of the said shipment of wheat and each in the amount of $142,000, or a total of $284,000 on this shipment, and said certificates of insurance were, in due course, [fol. 35] endorsed and assigned by the assured to Louis Dreyfus & Company. Said certificates of insurance are attached to the agreed statement of facts submitted herewith and are marked Exhibits "D" and "E", and are made a part of this answer.

Thirteenth. By reason of the total loss of the said cargo of wheat, your claimant, Scottish Metropolitan Assurance Company, Limited, became liable to pay, and on November 3, 1924, did pay to the said Louis Dreyfus & Company the sum of $284,000 the amount of said insurance. This payment was made on said certificates of insurance No. A15017 and No. A15018 covering the grain which had been insured under open policy No. L100023.

Fourteenth. The policy of insurance issued by the Standard Marine Insurance Company, Ltd., to which reference is made in Article "Second" of the petition herein, did not constitute insurance on the said 200,000 bushels of wheat, but the subject matter of said insurance as specifically set forth in said policy, was an "Increased Value" which increased value was in excess of the market value of the grain and which was to be determined in accordance with the terms of the contract of insurance between the Standard

Marine Insurance Company, Ltd., and Louis Dreyfus & Company.

Fifteenth. That by reason of the payment by your claimant, Scottish Metropolitan Assurance Company, Limited, to Louis Dreyfus & Company, of the sum of $284,000 due under its policy, your claimant has become subrogated to the right of recovery of Louis Dreyfus & Company in this proceeding to the full extent of its payment to the assured, with interest to date of payment.

Sixteenth. That the Standard Marine Insurance Company, Limited, having insured the increased value of the 200,000 bushels of wheat, is entitled to be subrogated to the rights of the assured, Louis Dreyfus & Company, in the increased value of said wheat in excess of the sum of $284,000 previously insured by the shipper, Canadian Co-Operative Wheat Producers, Limited, with your claimant, Scottish Metropolitan Assurance Company, Limited.

Seventeenth. All and singular the premises are true.

Wherefore your claimant prays that this Honorable Court will be pleased to decree that your claimant, Scottish Met-
[fol. 36] ropolitan Assurance Company, Limited, share in any recovery in the above proceeding to the extent of your claimant's interest as hereinbefore set forth, and for such other and further relief in the premises as may be just and proper.

Bigham, Englar & Jones, Proctors for Claimant, Scottish Metropolitan Assurance Company, Limited, No. 64 Wall St., Borough of Manhattan, New York City, N. Y. Day & Day.

Duly sworn to by William L. Day. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

PETITION FOR INTERVENTION OF SCOTTISH METROPOLITAN ASSURANCE CO., LTD.—Filed June 16, 1927

The petition of the Scottish Metropolitan Assurance Company, Limited, intervening on its own behalf in the above

[fol. 37] entitled proceeding, respectfully alleges, upon information and belief, as follows:

First. Your petitioner is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain, engaged in the insurance business with an office and place of business located in the City of Toronto, Province of Ontario, Canada.

Second. On or about February 22, 1924, your petitioner, Scottish Metropolitan Assurance Company, Limited, issued its open policy of marine insurance No. L100023 to Alberta Cooperative Wheat Producers, Limited, and that on or about September 10, 1924, said policy of insurance was endorsed over, with the consent of said Alberta Cooperative Wheat Producers, Limited, and with the consent of your petitioner, Scottish Metropolitan Assurance Company, Limited, to the Canadian Co-Operative Wheat Producers, Limited. This insurance, as provided by endorsement attached to the said policy dated October 9, 1924, was as follows:

"To cover 100% interest in all shipments of grain and/or flaxseed and/or cereals and/or maize, their own, or in which they may have an insurable interest, or the property of others which they may receive instructions to insure, such instructions being mailed or given the Canadian Co-Operative Wheat Producers, Limited, in writing, prior to shipment and before any known or reported loss or accident."

"All other terms and conditions remaining unchanged."

A copy of the said policy of insurance and endorsement is annexed to the agreed statement of facts submitted herewith, marked Exhibit "C" and is made a part of this petition.

Third. Under contract dated August 25, 1924, Louis-Dreyfus & Company purchased from the Canadian Co-Operative Wheat Producers, Limited, 200,000 bushels of Manitoba No. 2 Northern Wheat for future delivery at Montreal, Canada, the invoices covering said purchase being dated October 28, 1924. Thereafter, on or about Octo-

ber 27, 1924, the said Canadian Co-Operative Wheat Producers, Limited, shipped the said 200,000 bushels of wheat from Port Arthur and Fort William, Canada, on the S. S. "Glenorchy", for delivery at Montreal.

[fol. 38] Fourth. On October 28, 1924, your petitioner, Scottish Metropolitan Asurance Company, Limited, issued under its open policy No. L100023 to the Canadian Co-Operative Wheat Producers, Limited, two certificates of insurance numbered respectively A15017 and A15018, each covering 100,000 bushels of the said shipment of wheat and each in the amount of $142,000, or a total of $284,000 on this shipment, and said certificates of insurance were, in due course, endorsed and assigned by the assured to Louis-Dreyfus & Company. Said certificates of insurance are attached to the agreed statement of facts submitted herewith and are marked Exhibits "D" and "E", and are made a part of this petition.

Fifth. On October 29, 1924, during the pendency of said insurance and while the said wheat was on board the S. S. "Glenorchy" the said S. S. "Glenorchy" and cargo sank in collision with the S. S. "Leonard B. Miller", and both the "Glenorchy" and her cargo of wheat became a total loss.

Sixth. By reason of the total loss of the said cargo of wheat, your petitioner, Scottish Metropolitan Assurance Company, Limited, became liable to pay, and on November 3, 1924, did pay to the said Louis-Dreyfus & Company the sum of $284,000, the amount of said insurance. This payment was made on said certificates of insurance No. A15017 and No. A15018 covering the grain which had been insured under open policy No. L100023.

Seventh. In the above entitled proceedings for limitation of liability instituted by Columbia Steamship Company as owner of the S. S. "Leonard B. Miller", this Court has held that the collision between the S. S. "Glenorchy" and the S. S. "Leonard B. Miller" was due to the faults of both vessels and by final decree entered in this proceeding on or about February 15, 1927, has ordered, adjudged and decreed that Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners trading under the firm name and style of

Louis-Dreyfus & Company, as owners of the cargo laden on the S. S. "Glenorchy" at the time of said collision, have and recover from the petitioner, Columbia Steamship Company, and the Hartford Accident & Indemnity Company, as surety, the sum of $322,487.65, of which amount the sum of $309,500 is on account of the 200,000 bushels of wheat hereinbefore referred to, together with interest thereon at the rate of five per cent. per annum from October 29, 1924, until the same shall be paid.

[fol. 39] Eighth. That after the entry of the final decree herein and on or about April 23, 1927, a petition of intervention was filed in this proceeding by Standard Marine Insurance Company, Limited, in which petition it is alleged that on or about July 12, 1924, the said Standard Marine Insurance Company, Limited, issued its open policy of insurance No. 1010, wherein and whereby it insured Louis-Dreyfus & Company against perils of the Lakes and other enumerated perils on grain owned by the said assured or in which the said assured might have an interest. It is further alleged in said petition that the amount of said insurance effective on August 1, 1924, as provided by endorsement attached to said open policy was as follows:

"To cover 'Increased Value' on grain owned by the assured or in which the assured may have an interest, such increased value for the purposes of this insurance to be arrived at by taking the difference between the c.i.f. invoice cost and the highest market value per bushel, plus 5¢ (five cents) as set out in the New York Journal of Commerce between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the certificate, both days inclusive; and in the event of casualty to be valued at the difference between the c.i.f. invoice cost and the highest market value per bushel, plus 5¢ (five cents) as set out in the New York Journal of Commerce between the day of sailing of the vessel at point of shipment and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive."

It is further alleged in said petition that by reason of the total loss of the said cargo the petitioner, Standard Marine

Insurance Company, Limited, paid to the said Louis-Dreyfus & Company the sum of $62,500, the amount of said insurance.

Ninth. That the said policy of insurance issued by Standard Marine Insurance Company, Limited, by its terms constituted insurance only on "Increased Value" in excess of market value which increased value was to be determined in accordance with the terms of the contract of insurance between Standard Marine Insurance Co., Ltd., and Louis-Dreyfus & Co.

[fol. 40] Tenth. That by reason of the payment of your petitioner, Scottish Metropolitan Assurance Company, Limited, to Louis-Dreyfus & Company, of the sum of $284,000 due under its policy, your petitioner has become subrogated to the right of recovery of Louis-Dreyfus & Company in this proceeding to the full extent of its payment to the assured, with interest to date of payment.

Eleventh. That the Standard Marine Insurance Company, Limited, having insured the increased value of the 200,000 bushels of wheat, is entitled to be subrogated to the rights of the assured, Louis-Dreyfus & Company, in the increased value of said wheat in excess of the sum of $284,000 previously insured by the shipper, Canadian Co-Operative Wheat Producers, Limited, with your petitioner, Scottish Metropolitan Assurance Company, Limited.

Wherefore your petitioner prays that this Honorable Court will be pleased to decree that your petitioner, Scottish Metropolitan Assurance Company, Limited, share in any recovery in the above proceeding to the extent of your petitioner's interest as hereinbefore set forth, and for such other and further relief in the premises as may be just and proper.

Bigham, Englar & Jones, Proctors for Petitioner, Scottish Metropolitan Assurance Company, Limited, No. 64 Wall Street, Borough of Manhattan, New York City, N. Y. Day & Day.

Duly sworn to by William L. Day. Jurat omitted in printing.

[fol. 41] IN UNITED STATES DISTRICT COURT

ANSWER OF STANDARD MARINE INSURANCE COMPANY LTD., TO PETITION FOR INTERVENTION—July 25, 1927

The answer of Standard Marine Insurance Company, Ltd., to the petition of Scottish Metropolitan Assurance Company, Limited, intervenor, respectfully alleges on information and belief as follows:

First. It admits the allegations contained in the first article of the petition.

Second. It admits the allegations contained in the second article of the petition, except that for the exact terms and conditions of Scottish Metropolitan Assurance Company, Limited's open policy of marine insurance it refers to the copy of said policy which is "Exhibit C" of the agreed statement of facts in this suit.

Third. It admits the allegations contained in the third article of the petition.

Fourth. It admits the allegations contained in the fourth article of the petition.

Fifth. It admits the allegations contained in the fifth article of the petition.

[fol. 42] Sixth. It admits that by reason of the total loss of the said cargo of wheat, Scottish Metropolitan Assurance Company, Limited, became liable to pay, and on November 3, 1924, did pay to the said Louis-Dreyfus & Company the sum of $284,000, the amount of said insurance. It denies that it has any knowledge or information sufficient to form a belief as to the other allegations contained in the sixth article of the petition.

Seventh. It admits the allegations contained in the seventh article of the petition.

Eighth. It admits the allegations contained in the eighth article of the petition, but for the exact allegations of the petition of intervention of Standard Marine Insurance Company, Ltd., it refers to the original on file in this court in this suit.

Ninth. It denies the allegations contained in the ninth article of the petition, and for the exact terms and provi-

sions of the Standard Marine Insurance Company, Ltd.'s policy of insurance, it refers to a copy thereof which is annexed to the petition of intervention of Standard Marine Insurance Company, Ltd., on file in this court in this suit.

Tenth. It denies the allegations contained in the tenth article of the petition.

Eleventh. It denies that the Standard Marine Insurance Company, Ltd.'s insurance on the 200,000 bushels of wheat is correctly described in the eleventh article of the petition and for the exact terms and conditions of the said policy of insurance it refers to the copy of said policy annexed to the petition of intervention of Standard Marine Insurance Company, Ltd., on file in this court in this suit. It denies that the right of Standard Marine Insurance Company, Ltd., by subrogation is limited as alleged in the eleventh article of the petition.

Twelfth. Further answering as a further defense herein it refers to the amended petition of Standard Marine Insurance Company, Ltd., filed in this court in this case on April 23, 1927, and incorporates the same in this answer and makes it part hereof, and repeats and re-alleges all the allegations contained in said amended petition with the same force and effect as though here set forth at length. [fol. 43] Wherefore your claimant prays that the recovery in the above limitation proceeding, together with interest thereon at the rate of five percent. (5%) per annum from October 29, 1924, insofar as said recovery is applicable to the said 200,000 bushels of wheat, be divided pro rata between the claimant and Scottish Metropolitan Assurance Company, Limited, in proportion to the amount paid by each of them to the said Louis-Dreyfus & Company under their respective policies of insurance referred to in the petition herein.

James M. McSweeney, Guarantee Title Building, Cleveland, Ohio; Duncan & Mount, 27 William Street, New York City, New York, Proctors for Standard Marine Insurance Company, Ltd.

Duly sworn to by Russel T. Mount. Jurat omitted in printing.

[fol. 44] IN UNITED STATES DISTRICT COURT

ORDER REFERRING THE CASE TO WILLIAM B. WOODS, AS SPECIAL COMMISSIONER—April 20, 1927

An order having been entered herein on March 22, 1927, whereby it was ordered that the petition of intervention of Standard Marine Insurance Company, Ltd., be filed in this proceeding, and further ordering that the Columbia Steamship Company, as owner of the steamer Leonard B. Miller, the Hartford Accident & Indemnity Company, its stipulator for value, and Louis Louis-Dreyfus and Charles Louis-Dreyfus, co-partners trading under the firm name and style of Louis-Dreyfus & Company, owners of the cargo on the S/S Glenorchy and claimants herein, and their proctors, Messrs. Day & Day, show cause why an order should not be made herein allowing the said Standard Marine Insurance Company, Ltd., to prosecute its said petition of intervention in these proceedings, and staying the payment of all sums of money in excess of $250,000. by the said Columbia Steamship Company and/or its stipulator for value, to the said Dreyfus & Company and/or their said proctors under the final decree entered in this limitation proceeding, until the final determination of the issues raised by the said petition of intervention, and the motion on said order to show cause having been duly brought on for hearing on April 2, 1927, and James M. McSweeney, appearing in support of said motion, and Messrs. Day & Day, attorneys for Dreyfus & Company having appeared and stated in open Court that they did not oppose the said motion, and no other party appearing in opposition to the said motion, it is now, on motion of James M. McSweeney and Duncan & Mount, proctors for Standard Marine Insurance Company Ltd.,

Ordered:

1. That Standard Marine Insurance Company, Ltd., have leave within 10 days after entry of this order to file an amended petition of intervention in order to correct the statements of amounts in its petition of intervention already filed herein;

2. That Dreyfus & Company have 20 days after service of a copy of this order and a copy of the said amended

petition to file and serve their answer to the said amended petition of intervention;

[fol. 45] 3. That the case be referred to Wm. B. Woods, Cleveland, Esq., as Special Commissioner, to hear the evidence of the parties and report with all convenient speed to the Court, his findings of fact and conclusions of law on the issues raised by the said amended petition and any answers that may be filed thereto.

4. That Scottish Metropolitan Insurance Company, Ltd. have leave to file its petition of intervention in this limitation proceeding, but if Scottish Metropolitan Insurance Company, Ltd., shall file its petition of intervention, it shall also answer the amended petition of Standard Marine Insurance Company, Ltd.

5. That the said Columbia Steamship Company, and the said Hartford Accident & Indemnity Company, be and they hereby are restrained from making any payment under the said final decree of February 15, 1927, to the said Louis Louis-Dreyfus and Charles Louis-Dreyfus, co-partners trading under the firm name and style of Louis-Dreyfus & Company and/or their said proctors in excess of the sum of $250,000. until the hearing and determination of the issues raised by the amended petition of intervention of Standard Marine Insurance Company, Ltd., and the petition of intervention (if filed) of Scottish Metropolitan Insurance Company, Ltd., and the answers that may be filed to the said two petitions and until ten (10) days after the service of an order to be entered on such final determination, with notice of entry thereof, has been made upon the proctors for the Standard Marine Insurance Company, Ltd.

IN UNITED STATES DISTRICT COURT

AGREED STATEMENT OF FACTS

On October 29, 1924, a collision occurred between the S. S. "Glenorchy" and the S. S. "Leonard B. Miller," resulting in the sinking and total loss of the "Glenorchy" and her cargo of 208,392-40/60 bushels of wheat.

Suit was brought by Louis Dreyfus & Co., as owner of the said cargo on the S. S. "Glenorchy" against the "Leonard B. Miller," and thereafter a petition for limi-
[fol. 46] tation of liability was filed in this Court by Columbia Steamship Co., as owner of the "Leonard B. Miller." Claim was filed in this limitation proceeding by Louis Dreyfus & Co., for a recovery of their damages for the loss of the wheat aforesaid. After trial, both the "Miller" and "Glenorchy" were held at fault, and Louis Dreyfus & Co. was allowed a full recovery. The amount of Louis Dreyfus & Co.'s damages was fixed by agreement at $322,487.55, with interest thereon at 5% per annum from October 29, 1924.

After entry of final decree in the limitation proceedings, a petition of intervention was filed by Standard Marine Insurance Co., Ltd., "intervening for its interest, by subrogated rights, in the fund in court in the above entitled cause, represented by the bond or stipulation for value of the S. S. 'Leonard B. Miller.'" Thereafter a petition of intervention was filed by Scottish Metropolitan Assurance Co., Ltd., intervening for its interest, by way of subrogation, in the said recovery.

The facts are as follows:

Under contract dated August 25, 1924, Louis Dreyfus & Co. purchased from the Canadian Co-operative Wheat Producers, Ltd., 200,000 bushels Manitoba No. 2 Northern Wheat for future delivery at Montreal, on C.I.F. terms as appears from invoices dated October 28, 1924, being Exhibits A and B annexed hereto and made a part hereof. Thereafter on October 27, 1924, the Canadian Co-operative Wheat Producers, Ltd. shipped the 200,000 bushels of wheat on the S. S. "Glenorchy" for delivery at Montreal.

The C.I.F. invoice price is stated in the said invoices as $1.38½ per bushel, being a total of $138,500. for each invoice, and a total for the entire shipment of $277,000. The notations at the foot of the invoices indicate that the 100,000 bushels of wheat covered by each invoice were insured by the shipper at $142,000. or a total of $284,000. for the 200,000 bushels.

The grain in question was shipped by Canadian Co-operative Wheat Producers, Ltd. on the S.S. "Glenorchy" on October 27, 1924, and constituted the greater part of

that vessel's cargo. This grain became a total loss as a result of the collision which occurred on October 29, 1924.

The insurance referred to in the invoices was effected by the Canadian Cooperative Wheat Producers, Ltd. with the Scottish Metropolitan Assurance Co., Ltd., under an [fol. 47] open policy, No. L100023, dated February 22,1924, which was originally issued to Alberta Cooperative Wheat Producers, Ltd., but which, on September 10, 1924, was endorsed over with consent of said Alberta Wheat Producers, Ltd. and the said Scottish Metropolitan Assurance Co., Ltd. to the Canadian Cooperative Wheat Producers, Ltd., a true and correct copy of which policy is hereto annexed and marked Exhibit "C" and is made a part hereof.

On the 26th day of October, 1924, two certificates of insurance were issued by the Scottish Metropolitan Assurance Company, Ltd., under said policy No. L 100023, to the Canadian Cooperative Wheat Producers, Ltd., said certificates being numbered A 15017 and A 15018, respectively (Exhibits "D" and "E") and are made a part hereof.

On or about July 12, 1924, the Standard Marine Insurance Co., Ltd., issued to Louis Dreyfus & Co. its open policy of marine insurance No. 1010. A true and correct copy of said policy of Standard Marine Insurance Co., Ltd., is annexed to the petition of intervention of said Standard Marine Insurance Co., Ltd., and said policy is made a part hereof.

Thereafter Louis Dreyfus & Company, through their brokers, R. F. Murray & Bro., Inc., made a declaration to the Standard Marine Insurance Company, Ltd., under open policy No. 1010, covering the shipment in question, by letter dated October 30, 1924, supplemented by detail statement dated October 31, 1924. No certificate was issued by Standard Marine Insurance Company, Ltd., covering this shipment. True and correct copies of said letter of October 30, 1924 and said statement of October 31, 1924, are hereto annexed, marked Exhibits F and G respectively and are made a part hereof.

On November 3rd, 1924, Scottish Metropolitan Assurance Co., Ltd., paid Louis Dreyfus & Co. the sum of $284,000. which amount was in fact due from Scottish Metropolitan Insurance Co. to Dreyfus & Co. This payment was made on said Certificates of Insurance No. A15017 and A15018, covering the grain which had been insured under

open policy No. L 100023 of the Scottish Metropolitan Assurance Co., Ltd., issued to the Canadian Cooperative Wheat Producers, Ltd., which certificates had in due course been endorsed to Louis Dreyfus & Co.

After the loss, Louis Dreyfus & Co. made claim against the Standard Marine Insurance Co., Ltd., for $62,500., as per Exhibit G hereto annexed.

[fol. 48] The said amount of $62,500. was in fact due from Standard Marine Insurance Co., Ltd. to Dreyfus & Co. under the said policy and was paid by the Standard Marine Insurance Co., Ltd., to Louis Dreyfus & Co. on November 28, 1924.

The decree of the District Court in the limitation proceedings, in favor of Louis Dreyfus & Co. is in the amount of $322,487.65 with interest at 5% per annum from October 29, 1924. The recovery awarded to Louis Dreyfus & Co. is computed upon the actual value at port of loading on the total shipment of 208,392-40/60 bushels of wheat, which value was fixed by agreement at $1.54¾ per bushel.

The actual value at port of loading of the 200,000 bushels of wheat referred to above has been fixed in the final decree in the limitation proceedings, at $1.54¾ per bushel or at a total value of $309,500.

This stipulation is intended by the parties to be solely a stipulation of fact, without prejudice to the contentions of the respective parties as to the legal effect of such facts.

Duncan & Mount, Proctors for Standard Marine Insurance Co., Ltd. Bigham, Englar & Jones, Proctors for Louis Dreyfus & Co. and Scottish Metropolitan Assurance Co., Ltd.

EXHIBIT "A."

[A]lberta]* Canadian Co-operative Wheat Producers Limited

No. —

Grain Exchange

Winnipeg, Can., October 28th, 1924.

M Messrs. L. Dreyfus & Company, New York, N. Y.:

Contract August 25, 1924. No. 1.

Shipped for your a/c and risk per S/S "Glenorchy," [fol. 49] from Fort William to Montreal, Que., 100,000.00 bushels Manitoba 2 Northern Wheat @ $1.38½ per bushel $138,500.00

C. I. F.

Documents attached to Demand draft through the Canadian Bank of Commerce.

Payment in Canadian Funds.

(Achat 414.)

$138,500.00

Bs/L Dated October 26th, 1924. E. & O. E.

Bushels	Insurance certificate No.	Amount of insurance
100,000.00	A 15018	$142,000.00

EXHIBIT "B"

[Alberta]* Canadian Co-operative Wheat Producers, Limited

No. —

Grain Exchange

Winnipeg, Can., October 28th, 1924.

M Messrs. L. Dreyfus & Company, New York, N. Y.:

Contract August 25, 1924. No. 2.

Shipped for your a/c and risk per S/S "Glenorchy" from Fort William to Montreal, Que., 100,000.00 bushels

[* Erased in copy.]

of Manitoba 2 Northern Wheat @ $1.38½ per bushel $138,500.00

C. I. F.

Documents attached to demand Draft through the [Bank of Manitoba]* Canadian Bank of Commerce.

Payment in Canadian Funds.

(Achat 415.)

$138,500.00

Bs/L Dated October 26th, 1924. E. & O. E.

Bushels	Insurance certificate No.	Amount of insurance
100,000	A 15017	$142,000.00

[fol. 50] EXHIBIT "C"

Copy

Lake Contract No. L. 100023

Scottish Metropolitan Assurance Company, Limited, of Edinburgh, Scotland

E. W. Schauffler, Marine Underwriter, 18 Wellington Street East, Toronto, Ontario

Canadian Marine Branch

The Assurers not to be liable under this policy for more than $— by any one vessel or in any one place, at one time, unless otherwise agreed upon at the time of endorsement.

Alberta Co-Operative Wheat Producers, Limited, on account of Whom it may concern.

Loss, if any, payable to as per form attached.

Do Make Insurance, and cause to be insured, lost or not lost, at and from as per form attached.

The Assurers are to be entitled to premium at their usual rates on all shipments reported or not. It is warranted by

[* Erased in copy.]

the Assured to report every shipment on the day of receiving advice thereof, or as soon thereafter as may be practicable, when the rate of premium shall be fixed by the Assurers. Premium payable monthly in cash.

The said goods and merchandise hereby insured are valued (premium included) at as per form attached.

Beginning the adventure upon the said goods from and immediately following the loading thereof on said vessel at as per form, as aforesaid, and so shall continue and endure until the same shall arrive and be safely landed at the port of destination, but not to exceed forty-eight hours after the time of arrival.

Touching the adventures and perils which the said Assurers are contented to bear and take upon themselves they are of the Lakes, Rivers, Fires, Jettisons, and all other perils and misfortunes that have or shall come to the hurt, detriment or damage of the said goods, or any part thereof, excepting all perils, losses or misfortunes arising from the want of ordinary care and skill in loading and stowing the cargo of, or in navigating the said vessel, from theft, barratry or robbery, or other legally excluded causes. And in case of loss or misfortune, it shall be lawful and necessary [fol. 51] to and for the insured, or insurers, their agents, factors, servants and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovery of the said goods or any part thereof, and to proceed against common carriers or bailees, who are or may be liable, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the said goods, in case of disaster, or in such process be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability, under this Policy, but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party. To the charges whereof the said Assurers will contribute in such proportion as the sum herein insured bears to the whole value of the goods so insured.

And in case of loss, such loss to be paid in thirty days after proof of loss and proof of interest in said goods, are furnished these Assurers. Provided Always, and it is hereby further agreed, that if the said Insured shall have made any other insurance upon the goods aforesaid, prior in day of date to this Policy, then the said Assurers shall

be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the goods hereby insured; and the said Assurers shall return the premium upon so much of the sum by them insured, as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said goods subsequent in date to this Policy, the said Assurers shall nevertheless be anwerable for the full extent of the sum by them insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made. Other insurance upon the goods aforesaid, of date the same day as this Policy, shall be deemed simultaneous herewith; and the said Assurers shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. It Is Also Agreed, that the property be warranted by the Assured, free from any charge, damage or loss, which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war. And in case of loss to the goods hereby insured, these Assurers, their agent or repre-
[fol. 52] sentative, at or nearest the first port of discharge, shall have prompt notice of same, and shall have every opportunity and facility for ascertaining the cause, extent and amount of loss. It Is Furthermore Hereby Expressly Provided that no suit or action against these Assurers, for the recovery of any claim for loss or damage upon, under or by virtue of this Policy shall be sustained in any Court of Law or Equity; unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur; and in case any such suit or action shall be commenced, after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence and a conclusive defence against the validity of the claim thereby so attempted to be enforced.

This insurance warranted to be in all cases null and void as concerns loss or damage from fire on land to the extent of any fire insurance directly or indirectly covering upon the same property, whether prior or subsequent hereto in date, and it is also understood and agreed, that in case any

agreement be made or accepted by the Assured with any carrier by which it is stipulated that such or any carrier shall have, in case of any loss for which he may be liable, the benefit of this insurance, or exemption in any manner from responsibility grounded on the fact of this insurance, then and in that event the Insurers shall be discharged of any liability for such loss hereunder, but this Policy in these and all cases of loss or damage by perils insured against shall be liable and owe actual payment for (only) what cannot be collected from carrier and/or bailees and/or fire insurers of properly lost or damaged, as before stated, but in case of final failure to collect from carrier and/or bailees and/or fire insurers, this Policy shall be duly liable, provided always, the loss shall constitute in other respects a claim under this insurance, and in the event of loss or damage, this Policy shall be null and void to the extent of any payment made by any carrier or bailee, liable or not, or any payment made by any party in purchase of a claim hereunder, any assignment whatever given by the assured to the contrary notwithstanding.

It is also understood and agreed, that in case of loss or damage under this Policy, the Assured in accepting payment therefor, thereby and by that act assigns and transfers to these Assurers, all his right or their right to claim for loss or damage, as against the carrier or any Person or [fol. 53] Persons, Corporation or Corporations, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery, paid or incurred by the said Assurers and any act of the Insured, waiving or transferring or tending to defeat or decrease any such claim against such carrier or any person or persons, corporation or corporations, whether before or after the insurance was made under this Policy, Shall Be a cancellation of the liability of these Assurers, for or on account of the risk insured for which loss is claimed.

And it is understood and agreed, that these Assurers or their Agent shall have free access at all reasonable hours to the books, accounts, instructions and correspondence of the Assured, containing statements of, or which relate to shipments and receipts covered by this Policy. This Policy may be declared void by either party on giving a written

notice to that effect to the other party, but without prejudice to any risk then pending.

Deck Cargoes.—It is understood that goods or merchandise covered by this Policy shall be under deck, unless otherwise specified, and an additional premium paid; and deck cargoes are insured against total loss of packages only; the minimum amount of such loss to make a claim shall be Ten per cent., except salt, which shall be Twenty per cent. of the whole number of packages insured on deck; and in all cases on deck risks to be free from loss by wet, leakage, breakage or exposure.

Warranted by the Assured free from claim on account of riot or other civil commotion, capture, seizure, detention or destruction, by or arising from any belligerent nation, or by or from any officer, civil or miltary, or other person claiming to act in their name or under their authority, or in their behalf.

Warranted by the Insured free from any damage or injury from dampness or frost, heating, sweating, steaming, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual water contact with the article damaged, and to be free from liability for leakage of molasses or other liquids, or breakage of articles liable to break from their own nature, unless occasioned by the perils insured against. In case of loss or injury to any part of a machine consisting when complete, for sale, or use, of several parts, the Insurers shall only be liable for the insured value of the part lost or damaged.

[fol. 54] N. B.—This Policy is subject to the usages and regulations of the Great Lakes, as to all matters of adjustment and settlement of losses and averages not herein specified and provided for, and the adjustment of any loss hereunder shall be made by a competent adjuster of marine losses, who shall be designated by the Insurers, but no partial loss or particular average to be paid unless amounting to Five per cent.

It is understood and agreed, as one of the conditions under which this Policy is issued and endorsements made thereon, that if the insurance is procured by any person or persons other than the Assured, they shall be deemed the agent or agents of the Assured and not of these As-

surers in any and all transactions relating to this insurance.

If the voyage aforesaid shall have begun, and shall have terminated before the date of this Policy, then there shall be no return of premium on account of such termination.

In witness whereof the undersigned on behalf of the said Company has hereunto subscribed his name, in the City of Toronto, this 22nd day of February, 1924.

Countersigned? E. W. Schauffler, Marine Underwriter.

Copy

May 19th, 1924.

Endorsement to be Attached to and Made Part of Policy No. L100023 of the Scottish Metropolitan Assurance Company, Limited, Issued to Alberta Co-Operative Wheat Producers Limited, on Grain, etc., Covering Against as per Policy.

It is understood and agreed that as of all steamers sailing on and after this date these assurers are not to be liable for more than Seven Hundred and Fifty Thousand $750,000 Dollars per any one steel steamer at any one time unless otherwise agreed upon at time of endorsement.

All other terms and conditions remaining unchanged.

[fol. 55]

Copy

Sept. 10th, 1924.

Endorsement to be Attached to and Made Part of Policy No. L. 100,023 of the Scottish Metropolitan Assurance Company, Limited, Issued to Alberta Co-operative Wheat Producers Limited, on Grain, etc., Covering Against as per Policy

The interest in this policy is now vested in Canadian Co-Operative Wheat Products Limited and not as written.

All other terms and conditions remaining unchanged.

Copy

Toronto, Ontario, Oct. 9th, 1924.

Endorsement to be Attached to and Made Part of Policy No. L. 100,023 of the Scottish Metropolitan Assurance Company, Limited, Issued to Canadian Co-Operative Wheat Producers Limited, on Grain, etc., Covering Against as per Policy

It is understood and agred that as of October 8th, 1924, Clause No. 3 of this policy is deleted and replaced by the following:

"To cover 100% interest in all shipments of grain and/or flaxseed and/or cereals and/or maize, their own, or in which they may have an insurable interest, or the property of others which they may receive instructions to insure, such instructions being mailed or given the Canadian Co-Operative Wheat Producers Limited, in writing, prior to shipment and before any known or reported loss or accident."

All other terms and conditions remaining unchanged.

Copy

Oct. 20th, 1924.

Endorsement to be Attached to and Made Part of Policy No. L. 100,023 of the Scottish Metropolitan Assurance Company, Limited, Issued to Canadian Co-operative Wheat Producers Limited, on Grain, etc., Covering Against as per Policy.

It is understood and agreed that as of all steamers sailing on and after this date these assurers are not to be liable for more than Nine Hundred Thousand ($900,000) Dol. [fol. 56] lars per any one steel steamer at any one time unless otherwise agreed upon at time of endorsement.

All other terms and conditions remaining unchanged.

Copy

March 7th, 1927.

Endorsement to be Attached to and Made Part of Policy No. L. 100,023 of the Scottish Metropolitan Assurance Company, Limited, Issued to Alberta Co-operative Wheat Producers, Limited, on Grain, etc., Covering Against as per Policy

It is understood and agreed that as from inception Clause No. 3 of the form attached to this policy is amended to read and cover as follows:

"To cover on shipments of grain and/or flaxseed and/or cereals and/or maize, made by or for account of Albert Co-Operative Wheat Producers Limited, in which they have an insurable interest, or which they may have instructions to insure, and provided they declare to these assurers or to Johnson & Higgins of Ill., Inc., 175 West Jackson Blvd., Chicago, Illinois, by mail or telegraph prior to sailing of vessel or occurrence of loss, their intention to insure such cargo under this policy and also indicate the probable amount of insurance required, and the vessel's name. The assured to issue certificates for not exceeding the amount declared for these shipments on forms furnished by this Company, two (2) copies of each certificate to be mailed on date of issue, or as soon thereafter as practicable, to Johnson & Higgins of Ill. Inc., for transmission to this Company. Certificates in all cases to be issued prior to sailing of vessel or not later than forty-eight (48) hours thereafter."

All other terms and conditions remaining unchanged.

Alberta Co-operative Wheat Producers Limited

1. For account of whom it may concern.

2. Loss if any, payable to the Assured or their order as per certificates of insurance issued hereunder.

3. To cover all shipments of grain and/or flaxseed and/or cereals and/or maize for which Alberta Co-Operative Wheat [fol. 57] Producers, Limited, may issue the certificates of the assurers hereunder, advices of all such shipments to be mailed to Messrs. Johnson & Higgins of Illinois, Inc.,

Insurance Exchange, Chicago, Ill., on day of issue of such certificates and before known loss, but held covered reported or not reported provided same be communicated to assurers as soon as known to the assured and deficiency of premium made good.

This policy attaches and covers 100% of all shipments made as above.

4. Valued, premium included, at amount of invoice including all charges in the invoice and including prepaid or advanced or guaranteed freight, if any, plus Ten Percent unless otherwise agreed upon prior to shipment.

5. Per steamer and/or steamers and/or vessel or vessels, in tow or otherwise.

6. To be insured at and from port or ports on the Great Lakes to other port or ports on the Great Lakes, including to Montreal and/or Quebec and commencing with shipments made after the opening of the 1924 navigation season and to continue up to and including April 15th, 1925, as provided in the tariff of rates.

7. Including the risks of vessel storage, as may be required, prior to, during, or following the navigation season, either at port of shipment, port of discharge, or at intermediate ports. Where vessel storage is covered at port of shipment this insurance also covers the delivery trip at the next opening of navigation.

8. It is understood and agreed that merchandise insured under this policy is held covered until discharged from the vessel at destination, it being warranted that the assured will declare to this Company all shipments not discharged within a period of seventy-two hours after arrival as soon thereafter as practicable and pay an additional premium at the rate provided in the tariff.

9. It is understood and agreed as forming part of the conditions of this policy that shipments are to be covered hereunder as soon as laden on the vessel.

10. Average payable irrespective of percentage.

11. It is specifically understood and agreed that risks on grain while in elevators are in no case to be covered hereunder.

[fol. 58] 12. At the request of the assured, it is agreed that certificates issued under this policy shall cover against all damage resulting from "faults or errors in navigation or in the management of the vessels" from which vessels and their owners, agents or charterers are relieved of responsibility by the clause in Section 3 of the so-called Harter Act, from which the above quoted words are literally extracted, but nothing in this agreement shall be construed to render the assurers liable under any circumstances for any loss or damage due to the vice propre of the grain itself.

13. Permission to tow or to be towed.

14. Liberties as per Contract of Affreightment; the presence of the negligence clause and/or latent defect clause in the bills of lading and/or charter party and/or Contract of Affreightment, as between the assured and the assurer shall not prejudice this insurance.

15. Held covered at a premium to be arranged in case of deviation or change of voyage or from variation of the risk by reason of the exercise of any liberty granted to the shipowner or charterer under the contract of affreightment or of any omission or error in the description of the interest, vessel, or voyage, the assured to report such deviations and/or variations to these assurers as soon as practicable after they have knowledge thereof.

16. These assurers not to be liable for more than $600,000 per any one steamer or $400,000 per any one barge at one time unless otherwise agreed upon at the time of endorsement.

17. This policy covers in United States or Canadian Currency at the option of the assured provided either is endorsed on the certificate at the time of issue and in the absence of such endorsation on the certificate it is further understood and agreed that such certificates shall cover in Canadian Currency only.

18. Rates as per schedule attached.

19. It is agreed that the clauses contained in this rider shall be considered to supersede and annul any clauses to the same or similar effect and any clauses or conditions or practices to a contrary effect which may be printed in or previously attached to this policy, or which might otherwise be construed to govern or effect this insurance; and for the

[fol. 59] purposes of construction these clauses shall be deemed of the nature of written additions to the policy.

Attached to and forming part of Policy No. L100,023 of the Scottish Metropolitan Assurance Company, Limited.

Rates on Grain by Steel Steamers Classed I for Grain by American Bureau of Shipping, Great Lakes Department, from Fort William and/or Port Arthur

To	Lake Erie & Georgian Bay	Montreal direct or transshipped
April 16th, to Nov. 30	10¢	20¢
Dec. 1st to Dec. 5th	3/8%	
Dec. 6th to Dec. 9th	1/2%	
Dec. 10th to Dec. 12th	70¢	
Dec. 13th to Dec. 15th	1%	

Storage Risk at Port of Shipment

Before opening of navigation (and during season of navigation when required).

Storage Risk at Port of Destination

After close of navigation (and during season of navigation when required).

At rates of 1/3¢% per day or 10¢% per month.

Note.—Steel vessels classed 100 AI British Lloyds without restriction or equivalent classification to be considered the same as vessels classed 1 for grain by American Bureau of Shipping Great Lakes Department.

Exhibit "D"

Lake Grain

Certificate of Insurance

Scottish Metropolitan Assurance Company, Limited, of Edinburgh, Scotland

E. W. Schauffler, Marine Underwriter, 18 Wellington Street East, Toronto, Ontario

$142,000.00. No. A15017

Original

[fol. 60] Winnipeg, Manitoba, October 28th, 1924.

This is to certify that on the twenty-sixth day of October, 1924, we, the undersigned, insured under Policy No. L.

100,023 for Canadian Co-operative Wheat Producers, Limited, the sum of One hundred and forty-two thousand Dollars, on 100,000.00 bushels of Manitoba 2 Northern Wheat. Valued at $1.42 per bushel. Shipped on board of the Steamer "Glenorchy" at and from Fort William and/or Port Arthur, to Montreal via Port Colborne. Loss, if any, payable to the order of Canadian Bank of Commerce on presentation of this Certificate, and said loss to be adjusted with holder hereof, in conformity with the conditions of said Policy.

In case of loss or damage, consignee or holders of this Certificate are requested to give immediate notice to Johnson & Higgins of Illinois, Inc., Insurance Exchange, Chicago, Illinois.

This Certificate is not valid unless countersigned by Canadian Co-operative Wheat Producers, Limited.

E. W. Schauffler, Marine Underwriter.

Countersigned by Canadian Co-operative Wheat Producers Ltd. D. O. Stewart.

Held covered until discharged from vessel for a period not exceeding eighteen days after arrival. After seventy-two (72) hours an additional premium to be charged, pro rata of the fifteen (15) day tariff rate, to the original holder of certificate.

At the request of the assured, it is agreed that this certificate shall cover against all "damage resulting from faults or errors in navigation or in the management of the vessels," from which vessels and their owners, agents, or charterers are relieved of responsibility by the clause in Section 3 of the so-called Harter Act from which the above quoted words are literally extracted, but nothing in this agreement shall be construed to render the assurers liable under any circumstances for any loss or damage due to the vice propre of the grain itself; other conditions remaining unchanged. [fol. 61] With leave to tow and to be towed.

The five per cent. clause in the policies referred to in this certificate is hereby waived as per tariff conditions, unless this clause is crossed out by shipper.

It is agreed that in consideration of insurers paying to the assured, or owner of carrying vessel, any claims hereunder for general average contribution without surrender

of this certificate, the assured, their agents or assigns and/or the holders of this certificate guarantee these insurers against any further demand for same claim.

Held covered in case of deviation or change of voyage.

Endorsed on back: The Canadian Bank of Commerce New York. D. E. Younger, Agent. p. p. Louis-Dreyfus & Co., L. L.-Dreyfus.

Exhibit "E"

Lake Grain

Certificate of Insurance

Scottish Metropolitan Assurance Company, Limited, of Edinburgh, Scotland

E. W. Schauffler, Marine Underwriter, 18 Wellington Street East, Toronto, Ontario

$142,000.00. No. A15018

Original

Winnipeg, Manitoba, October 28th, 1924.

This is to Certify that on the twenty-sixth day of October, 1924, we, the undersigned, insured under Policy No. L. 100,023 for Canadian Co-operative Wheat Producers, Limited, the sum of One hundred and forty-two thousand Dollars, on 100,000.00 bushels of Manitoba 2 Northern Wheat. Valued at $1.42 per bushel. Shipped on board of the Steamer "Glenorchy" at and from Fort William and/or Port Arthur, to Montreal via Port Colborne. Loss, if any, payable to the order of Canadian Bank of Commerce on [fol. 62] presentation of this Certificate, and said loss to be adjusted with holder hereof, in conformity with the conditions of said Policy.

In case of loss or damage, consignees or holders of this Certificate are requested to give immediate notice to John-

son & Higgins of Illinois, Inc., Insurance Exchange, Chicago, Illinois.

This Certificate is not valid unless countersigned by Canadian Co-operative Wheat Producers, Limited.

E. W. Schauffler, Marine Underwriter.

Countersigned by Canadian Co-operative Wheat Producers, Ltd. D. O. Stewart.

Held covered until discharged from vessel for a period not exceeding eighteen days after arirval. After seventy-two (72) hours an additional premium to be charged pro rata of the fifteen (15) day tariff rate, to the original holder of certificate.

At the request of the assured, it is agreed that this certificate shall cover against all "damage resulting from faults or errors in navigation or in the management of the vessels," from which vessels and their owners, agents, or charterers are relieved of responsibility by the clause in Section 3 of the so-called Harter Act from which the above quoted words are literally extracted, but nothing in this agreement shall be construed to render the assurers liable under any circumstances for any loss or damage due to the vice propre of the grain itself; other conditions remaining unchanged.

With leave to tow and to be towed.

The five per cent. clause in the policies referred to in this certificate is hereby waived as per tariff conditions, unless this clause is crossed out by shipper.

It is agreed that in consideration of insurers paying to the assured, or owner of carrying vessel, any claims hereunder for general average contribution without surrender of this certificate, the assured, their agents or assigns and/or the holders of this certificate guarantee these insurers against any further demand for same claim.

[fol. 63] Held covered in case of deviation or change of voyage.

Endorsed on back: The Canadian Bank of Commerce New York. D. E. Younger, Agent. p. p. Louis Dreyfus & Co., L. L. Dreyfus.

EXHIBIT "F"

R. F. Murray & Bro. Inc., Insurance, N. Y. Produce Exchange Building, No. 8 Broadway

New York City, October 30, 1924.

Toronto Insurance & Vessel Agency, Toronto, Canada.

GENTLEMEN:

Re Louis Dreyfus & Co., s/s Glenorchy, Order No. 170

Our assured has just received telegraphic advices from their Winnipeg Office, dated October 29th, reading as follows:

"Glenorchy which left Fort William October twenty-seventh sank this afternoon collision with L. B. Miller."

As soon as we receive further information in connection with this loss, we will advise you. As this steamer sailed on the 27th of October with shipment of grain for Montreal, we are figuring the number of days for this voyage to be ten days, and insured value under our Assured's Open Policy will be figured on the basis of the highest C.I.F. Montreal quotation during the ten days from October 27, to which, of course, is added 5¢ as provided for in the policy.

As soon as the number of days elapse, we will forward you a statement showing the exact number of bushels [fol. 64] shipped, with all other details and in the meantime would appreciate your prompt acknowledgment of this notice.

Yours very truly, R. F. Murray & Bro. Inc. G. E. Woodhouse.

GEW:WK.

EXHIBIT "G"

Louis Dreyfus & Co., Produce Exchange Building, New York

Oct. 31st, 1924.

Debit note for Messrs. R. F. Murray & Bro. Inc., New York, N. Y.

Lake Steamer Glenorchy (A. 414-415).

Binder No. D 170. No. 2 Nor. Man.

Highest market value on Oct. 27th $1.64¾ per bushel plus 5¢	$1.69¾
CIF Invoice value per bushel	1.38½
Increased value per bushel	$.31¼
10/26 Loaded at Ft. William	174,000 bus.
10/26 Loaded at Pt. Arthur	26,000 bus.
10/26 Total loaded	200,000 bus.

Lake Steamer Glenorchy sank on October 29th, being a total loss, 200,000 bushels, at $.31¼ per bushel, $62,500.00.

[fol. 65] In United States District Court

Report of Special Commissioner—Filed Jan. 14, 1928

To the Honorable Judges of the District Court of the United States for the Northern District of Ohio, Eastern Division:

In pursuance to the decretal order made and entered in this cause, and bearing date of April 20, 1927, at a stated term of this Court held in the City of Cleveland in said district by which it was referred to Wm. R. Woods, Esq., as Special Commissioner, to hear the evidence of the parties and report with all convenient speed to this Court his findings of fact and conclusions of law on the issues raised on the amended petition of the Standard Marine Insurance Company, Ltd. and any answers that might be filed thereto; and,

The Scottish Metropolitan Assurance Company, Ltd. having thereafter filed its petition and also filed its answer to the amended petition of the Standard Marine Insurance Company, Ltd., and the Standard Marine Insurance Company, Ltd. having filed its answer to the petition of the Scottish Metropolitan Assurance Company, Ltd., the cause came on for hearing on the issues made up from said pleadings; and,

I, Wm. B. Woods, as Special Commissioner of said Court, do respectfully report that I have proceeded to investigate

the matters so referred to me, that I have been attended by the parties and their respective counsel in said controversy, and that I find and report as follows:

Findings of Fact

(1) The issues in this case concern the distribution of money paid by the two insurance companies to Louis Dreyfus & Company for the loss of a cargo of wheat, which, on October 27, 1924, was shipped on the S. S. "Glenorchy." On October 29, 1924, a collision occurred between the S. S. "Glenorchy" and the S. S. "Leonard B. Miller," resulting in the sinking and total loss of the "Glenorchy" and her cargo of 208,392-40/60 bushels of wheat.

(2) Suit was brought by Louis Dreyfus & Company, as owner of the said cargo on the S. S. "Glenorchy" against the "Leonard B. Miller," and thereafter a petition for limitation of liability was filed in this Court by Columbia Steamship Company, as owner of the "Leonard B. Miller." [fol. 66] Claim was filed in this limitation proceeding by Louis Dreyfus & Company, for a recovery of its damages for the loss of the wheat aforesaid. After trial, both the "Miller" and the "Glenorchy" were held at fault, and Louis Dreyfus & Company was allowed a full recovery. The amount of Louis Dreyfus & Company's damages was fixed by agreement at $322,487.55, with interest thereon at 5% per annum from October 29, 1924.

(3) Stated in a general way, the present controversy began when the one as to liability ended. After entry of final decree in the limitation proceedings, a petition of intervention was filed by Standard Marine Insurance Company, Ltd., "intervening for its interest, by subrogated rights, in the fund in Court in the above entitled cause, represented by the bond or stipulation for value of the S. S. 'Leonard B. Miller'." Thereafter a petition of intervention was filed by Scottish Metropolitan Assurance Company, Ltd., intervening for its interest, by way of subrogation, in the said recovery.

(4) Under contract dated August 25, 1924, Louis Dreyfus & Company purchased from the Canadian Cooperative Wheat Producers, Ltd., 200,000 bushels Manitoba No. 2 Northern Wheat for future delivery at Montreal, on C.I.F.

terms as appears from invoices dated October 28, 1924, being Exhibits A and B. Thereafter on October 27, 1924, the Canadian Co-operative Wheat Producers, Ltd., shipped the 200,000 bushels of wheat on the S. S. "Glenorchy" for delivery at Montreal.

(5) The C.I.F. invoice price is stated in the said invoices as $1.38½ per bu., being a total of $138,500 for each invoice, and a total for the entire shipment of $277,000. The notations at the foot of the invoices indicate that the 100,000 bu. of wheat covered by each invoice were insured by the shipper at $142,000 or a total of $284,000 for the 200,000 bushels.

(6) The grain in question, which was shipped by Canadian Co-operative Wheat Producers, Ltd., on the S. S. "Glenorchy" on October 27, 1924, constituted the greater part of that vessel's cargo and became a total loss in the collision on October 29, 1924.

(7) The insurance was effected by the shipper with the Scottish Metropolitan Assurance Company, Ltd., under its open policy No. L-100,023, dated February 22, 1924, to the [fol. 67] Alberta Co-operative Wheat Producers, Ltd., which on September 10, 1924, was regularly endorsed with consent of the said insurance company to the Canadian Co-operative Wheat Producers, Ltd. On October 26, 1924, two certificates of insurance were issued by the Scottish Metropolitan policy covering the 200,000 bu. of wheat valued at $1.42 per bu. shipped on the S. S. "Glenorchy."

(8) The provisions of the Scottish Metropolitan Assurance Company policy which are concerned in this controversy are as follows:

(Scottish Policy A.) "To cover 100% interest in all shipments of grain and/or flaxseed and/or cereals and/or maize, their own, or in which they may have an insurable interest, or the property of others which they may receive instructions to insure, such instructions being mailed or given the Canadian Co-operative Wheat Producers Limited, in writing, prior to shipment and before any known or reported loss or accident."

"Valued, premium included, at amount of invoice including all charges in the invoice and including prepaid

or advanced or guaranteed freight, if any, plus Ten Percent unless otherwise agreed upon prior to shipment."

(Scottish Policy B.) "It is also understood and agreed that in case of loss or damage under this policy the assured in accepting payment therefor thereby by that act assigns and transfers to these assurers all his right or their right to claim for los sor damage, as against the carrier or any person or persons, corporation or corporations to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery pair in incurred by the said assurers, and any act of the insured, waiving or transferring or tending to defeat or decrease any such claim against such carrier or any person or persons, corporation or corporations whether before or after the insurance was made under this policy shall be a cancellation of the liability of these assurers, for or on account of the risk insured for which loss is claimed."

(9) The Standard Marine Insurance Company, Ltd., on July 12, 1924, issued to Louis Dreyfus & Company, [fol. 68] its open policy of marine insurance No. 1010. The provisions of the Standard Marine Insurance Company policy, which are concerned in this controversy are as follows:

(Standard Policy A, Rider of Aug. 1, 1924.) "To cover 'Increased Value' on grain owned by the Assured or in which the Assured may have an interest, such 'Increased value' for the purposes of this insurance, to be arrived at by taking the difference between the C.I.F. invoice cost and the highest market value per bushel, plus 5¢ (Five cents), as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the Certificates, both days inclusive; and in the event of casualty, to be valued at the difference between the C.I.F. invoice cost and the highest market value per bushel, plus 5¢ (Five cents) as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. Advice of all such shipments to be mailed to the Company, 64

King Street East, Toronto, Ontario, Canada, by registered letter on day of sailing of the vessel, or as soon thereafter as practicable."

(Standard Policy B.) "To cover all shipments of grain owned by the assured or in which the assured may have an interest and not insured by the shipper, such shipments to be valued, for the purposes of this insurance, at amount declared, such amount declared and advices of such shipment to be mailed to the company, 64 King Street, East Toronto, Ontario, Canada, by registered mail prior to sailing of the vessel."

(Standard Policy C.) "Warranted that any insurance granted herein shall not cover where the assured or any carrier or other bailee has insurance which would attach, if this policy had not been issued."

(Standard Policy D.) "It is also understood and agreed, that in case of loss or damage under this policy, the as-[fol. 69] sured, in accepting payment therefor, thereby and by that act assigns and transfers to this Company all his or their right to claim for loss or damage, as against the carrier or other person or persons, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by this Company; and any act of the Insured waiving or transferring, or tending to defeat or decrease any such claim against the carrier, or such other person or persons, whether before or after the insurance was made under this Policy, shall be a cancellation of the liability of this Company, for or on account of the risk for which loss is claimed."

(10) After notice of the collision on October 30, Louis Dreyfus & Company made a declaration to the Standard Marine Insurance Company, Ltd., under its policy, and furnished detailed statement on October 31, claiming as follows:

Highest Market Value on Oct. 27th $1.64¾ per bu. plus 5¢	$1.69¾
CIF Invoice value per bu.	1.38½
Increased value per bu.	$.31¼

10/26 Loaded at Ft. William	174,000 bus.
10/26 Loaded at Pt. Arthur	26,000 bus.
Total loaded	200,000 bus.

Lake Steamer Glenorchy sank on October 29th, being a total loss. 200,000 bus. at $.31¼ per bushel, $62,500.00.

(11) On November 3, 1924, Scottish Metropolitan Assurance Company paid Louis Dreyfus & Company the sum of $284,000, the amount due under its policy, the certificates of which had been endorsed in due course to Louis Dreyfus & Company.

(12) No certificate was issued by the Standard Marine Insurance Company covering this shipment; Louis Dreyfus & Company made claim against the Standard Marine Insurance Company for $62,500 as set out above, which said amount was in fact due by the Standard Marine Insurance Company, to the Louis Dreyfus & Company under said policy, and which was paid by Standard Marine Insurance Company, to Louis Dreyfus & Company on November 28, 1924.

[fol. 70] (13) The decree of the District Court in the limitation proceedings, in favor of Louis Dreyfus & Company is in the amount of $322,487.65 with interest at 5% per annum from October 29, 1924. This recovery awarded to Louis Dreyfus & Company is computed upon the actual value at port of loading on the total shipment of 208,392-40/60 bushels of wheat, which value was fixed by agreement at $1.54¾ per bu. The actual value at port of loading of the 200,000 bus. of wheat referred to above has been fixed in the final decree in the limitation proceedings, at $1.54¾ per bus. or at a total value of $309,500.

(1) The two insurances having been paid to Louis Dreyfus & Company to the amount of $346,500, were thus in excess of the $309,500 found due by the Court in the amount of $37,000. Also, the decree of the Court fixed the value of the cargo at $322,487.65, which is in excess of the value of the 200,000 bus. found by the decree at $1.54¾ per bu. to be worth $309,500.

The question presented is, "How shall the insurance fund awarded to Louis Dreyfus & Company be disposed of;

is the rule to be pro rata as claimed by the Standard Marine Insurance Company or is the Scottish Metropolitan Assurance Company so subrogated to the rights of Louis Dreyfus & Company that it is entitled to payment in full before any payment is made to the Standard Marine Insurance Company?"

CONCLUSIONS OF LAW

(1) That, where there are two marine insurers of a lost cargo, the marine insurance company which first pays its loss, by so paying its loss and taking an assignment of the claim of the insured against the other company, acquires no priority or advantage over the other insurance company which also pays to insurers under the terms of its policy and within the time fixed by its policy.

(2) That, where one marine insurance company insures a cargo of wheat of the value C.I.F. plus 3½¢ per bu. at the point of shipment, and another insures that part of the value of the market price per bu. at the point of delivery plus 5¢ per bu., which is above said C.I.F. price, and the cargo is lost, and on payment of said losses in full to the insured, the amount received by the cargo owner is in excess of what the court decrees is the value of the cargo in- [fol. 71] sured, then a rule of priority of subrogation in favor of the insurance company first paying does not apply and such excess of payment by the two insurance companies is to be returned to them pro rata.

(3) That, use of the words "to cover increased value of grain" shipped, in marine insurance policy, does not necessarily make such policy one of insurance on "profits" and, therefore, speculative.

(4) That, where two underwriters insured a cargo of wheat which was lost, the first underwriter by a valued policy "to cover 100% of the interest in that shipment of grain," and the other by an open policy "to cover increased value on grain owned by the assured or in which assured has an interest," and each underwriter paid its full loss to assured as the policy of each provided, which payments gave to the assured a sum greater than the value of the cargo as found by the Court, and the Court has also held

that assured should recover from the negligent ship owners the value of the cargo, the two underwriters are subrogated to the rights of assured against the ship owners.

(5) That, where the underwriter claiming on a valued policy based on a so-called "100% interest" in the cargo claims priority over the underwriter on an open policy, which is on "increased value" of the interest in cargo, the equitable rule to be followed since both are subrogated to the rights of the assured is that a priority shall not prevail and the two subrogated underwriters should share pro rata after payment of the expenses of litigation from the fund in the amount awarded the assured from the negligent ship owners; and that the assured may be made whole for his loss on the cargo, the order of disbursement of the fund should be: (1) expenses of litigation of cargo owner; (2) balance of fund to be paid pro rata to the two underwriters, since the assured has already been made whole by payment from the underwriters.

Memorandum

Briefs of able counsel indicate that they have industriously covered the field of marine insurance in search of authoritative precedents in the admiralty law of America and England, to find the equitable rule of disposition of the fund. All the authorities cited in the brief, and others, [fol. 72] have been examined by the Commissioner. The result of this search is that no precedent is found in any of the reported cases wherein facts have arisen such as this case presents. Analogous cases on marine insurance and subrogation and other cases have been found which are helpful. Starting then with the belief that the equitable disposition of this fund on the basis of the payment of each, would seem to be fair to each, and testing this by the analogies and precedents of the cases so far as applicable, this solution of the controversy is arrived at.

It was of a controversy between underwriters who had paid the losses, that Judge Hough had before him in Chemical Co. vs. Towing Co., 279 Fed. 684, pg. 686, when he said:

"The form has been dwelt upon as important for in substance this litigation is obviously a sort of case stated by two insurance companies, with a request that the courts

decide which of the two has succeeded in maneuvering the loss upon the other."

And Justice Holmes in Oelwerke vs. Erlanger, 248 U. S. 521, said that, "Neither side would be likely to inspire enthusiasm." In those cases, each court left the parties where it found them, but here the court must act, for the fund is in court for all practicable purposes, for division and disbursement.

At the outset, it is agreed by the parties that the fees and disbursements of Louis Dreyfus & Company should first be deducted from the fund of $309,500 to be paid by the ship owners found to be negligent. The division of the fund remaining after payment of expenses presents the other questions which are to be determined in this controversy.

The claim of the Standard Marine Insurance Company is that after deducting the Dreyfus expense of litigation from the item of $309,500, the sum remaining should be distributed pro rata between the underwriters, that is, the Standard Marine Insurance Company should receive 62,500/346,500 of $309,500 minus Dreyfus expense of litigation, and the balance, or 284,000/346,500 of $309,500, minus Dreyfus expense of litigation, should be paid to the Scottish Metropolitan Assurance Company.

The claim of the Scottish Metropolitan Assurance Company is that after deducting the Dreyfus expense of litigation from the $309,500, it should be paid $284,000 and [fol. 73] whatever balance remains should be paid to the Standard Marine Insurance Company.

The question briefly stated is as follows: Where a cargo of wheat has been lost, the value of which has been found by the Court to be $309,500 is insured by a "valued" policy for $284,000, the increased value on the same cargo of wheat is insured in an open policy for $62,500, and these sums totaling $346,500 are paid to the cargo owner who subsequently recovers $309,500, the actual value of the cargo of wheat as damages from the ship owners responsible for the loss, how are the insurers to be subrogated and to share in the recovery of the $309,500 to be paid by the negligent ship owners?

By the doctrine of subrogation, the underwriter succeeds to, takes or acquires the rights of the insured against the

insurer after the underwriter has paid the loss. As the Court said in St. Louis, etc. Railway vs. Commercial Ins., 139 U. S. at pg. 235:

"In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. * * * But in any form of remedy the insurer can take nothing by subrogation but the rights of the assured; and if the assured has no right of action, none passes to the insurer."

It is settled law that the underwriter can acquire from the insured no more than he had. It is also the rule and another way of saying the same thing that the insured or cargo owner in this instance, will not be permitted to benefit by reason of his insurance or as has been said in one of the English cases, he will not be permitted "to take with both hands."

Where there was a loss of a ship insured by a "valued" policy for $25,000 and which sum was paid to the owner who subsequently recovered $37,500, or actual value of the ship as damages, the insurer was held to be entitled to only such amount as had been paid out. In The "Livingstone," 130 Fed. 746, Judge Coxe of the Circuit Court of Appeals said, pg. 747:

[fol. 74] "Viewed as an original proposition, to be determined solely by the fundamental rules of equity, it would seem that but one answer is possible. How can the court make a more equitable disposition of the fund than by disbursing it so that the status quo before the collision is re-established? The insurer gets back the money he has paid under the policy, the owner gets back the value of his ship, both are made whole, and neither is permitted to profit at the expense of the other. Such a result would certainly seem equitable, but it must, of course, be sustained by authority. In our system of jurisprudence prin-

ciple is reached through precedent. The rights of the interveners rest either upon abandonment, bill of sale or subrogation, or all combined."

The Court follows this with a discussion of the facts in the Livingstone case, which, while concerned with the loss of a ship, furnishes authority for guidance in the case at bar, the subject matter of which is the ship's cargo. On the point as to whether the assured could profit by the insurance paid after a loss has occurred, this decision is authority for the doctrine that the assured can have no profit from his insurance by reason of the loss he has sustained. As the Court further said, pg. 749:

"Where the insurer has paid the entire amount of the loss he becomes subrogated, to the extent of his payment, to whatever interest the insured has in the property and to the latter's right to proceed against one who has negligently caused the loss.

"The doctrine of subrogation has its origin in equity, its purpose is indemnity and its object is attained when the insurer has been fully compensated. The doctrine cannot be invoked to consummate injustice; it does not permit one party to secure an unfair advantage over the other; it does not permit the insurer to speculate, or profit or drive an unconscionable bargain. When he is paid in full, equity requires the return of the balance to the insured in payment of his uncompensated loss."

Quoting with approval Memphis, etc., Railroad vs. Dow, 120 U. S. 287, Liverpool Steam Co. vs. Phoenix Ins. Co., 129 U. S. 397, and in conclusion the Court said:

[fol. 75] "We are fully convinced that equity and good conscience do not require the Court to go further and permit them (insurers) to realize an enormous profit from the transaction."

So in the case at bar, if Dreyfus and Company could not profit by their loss, neither should the Standard Marine Insurance Company or the Scottish Metropoljtan Assurance Company. The question then comes since the insurance companies are both subrogated to certain rights of Louis Dreyfus & Company by reason of their policies,

to what extent are each of the companies subrogated and what is the share of each in the fund which this Court will order to be paid by the negligent ship owner to the underwriters?

The rule has been established that where there is a loss of insured property and the underwriters on "increased value" have paid the loss, such underwriters will share pro rata with other underwriters in the fund recovered from the negligent ship owner. This was held in the case of Brown vs. Merchants Marine Ins. Co., 152 Fed. 411, which is the case that presents facts nearest to the situation as presented here. The facts were that the S. S. "City of Kingstone" was insured by various insurance companies under separate policies, the vessel valued in each at $75,000. Two other companies insured the owners of the ship in two policies aggregating $12,200 "on disbursements and/or increased value," insurance being against total loss and in addition a Central F. and M. Insurance Company insured the ship in the sum of $4,800 against total loss only, no valuation being inserted in that policy. The "City of Kingstone" was sunk in collision with the S. S. "Glenogle" and all underwriters on hull together with Central F. and M. Insurance Company paid total loss and at the request of these underwriters the owner of the "Kingstone" brought suit to recover damages from the owner of the "Glenogle." The Court on trial found both vessels at fault, the value of "Kingstone" at $140,000, and decreed division of damages; $67,472.96 was paid into the Court by the owners of the "Kingstone" and after payment of costs there was left in the registry of the Court $47,426.97. Then two underwriters on disbursements or increased value intervened, alleging that they had paid a total loss, and that they were entitled to share pro rata with all underwriters now found in Court, which claim the District Court sustained and made pro rata distribution to all the under[fol. 76] writers. On appeal, this decision was affirmed, the Court expressly holding that the insurers on increased value were entitled to share pro rata in the fund. At pg. 413, Judge Gilbert said:

"The assured in the policies issued by the appellees was in fact the owner of the property insured, and could undoubtedly have recovered on the policies. Such being the case, we are unable to discover any recognized principle of

law or equity on which it should be held that the appellees are not entitled to rank equally with the other underwriters in the distribution of the fund in court. No ground for discrimination against the appellees can be found in the fact that the policies which they issued covered 'disbursements.' The object of insurance on disbursements is to insure the shipowner the recovery of additional sums beyond the amount covered by his insurance on ship and freight, and it is made against total loss only. Arnould, Marine Ins. Sec. 247. The International Navigation Company vs. Atlantic Mutual Ins. Co., (D. C.) 100 Fed. 304, Judge Brown said that policies on disbursements are in very common use, and are 'designed to cover a variety of interests not covered by policies in the ordinary form, including moneys which have gone into the construction of the hull and equipment and sunk in depreciation. * * * "Disbursement" policies are often issued where the hull is fully covered by other policies.' And, since the appellees could, as we have seen, have been compelled to pay the loss under their policies, they are not, as suggested by the appellant, mere volunteers in paying the same and therefore to be denied the right of subrogation. Nor do we see that their delay in paying or their refusal to participate in the proceedings to recover damages from the owners of the Glenogle should be held to be ground for excluding them from participation in the fund: Subrogation results by operation of law from the mere act of the payment of the loss, and does not depend on the voluntary act of the assured. Phoenix Ins. Co. vs. Erie Transportation Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; St. Louis, etc. Railway vs. Commercial Ins. Co., 139 U. S. 223, 235, 11 Sup. Ct. 554, 35 L. Ed. 154. In the Livingstone, 130 Fed. 746, 65 C. C. A. 610, the amount in controversy was recovered by [fol. 77] the unaided effort of the owners, and against the active opposition of the intervening underwriters. It was held, notwithstanding this fact, that the interveners were entitled to subrogation. We find the general doctrine applicable to this case in Arnould, Marine Ins. Sec. 1215, where it is said:

'Upon abandonment each of the underwriters participates in the benefits of the transfer by sharing in the proceeds of the salvage according to the proportion which the

amount of his subscription bears to the whole value of the thing insured, and this without regard to the date of the different subscriptions, or the priority of the policies, if more than one.'

We find no error in the decree of the District Court. It is accordingly affirmed."

In Federal Insurance Co. et al. vs. Detroit Fire and Marine Insurance Co., 202 Federal 648, certiorari denied 229 U. S. 620, the Brown case was cited with approval by the Circuit Court of Appeals for the Sixth Circuit, which was a case where there were different classes of underwriters on hull, cargo and freight.

In Federal Insurance Company case the S. S. "Etruria" was in collision with S. S. "Amasa Stone" and upon suit, both vessels were held to blame and damages divided. There was a total loss of the "Etruria" and her cargo and she was insured by sixteen companies, holding risks in varying sums amounting to an agreed valuation, and the ship owner was paid such valuation by the insurers. The cargo and freight were separately insured and these losses paid. Eight of the insurers including the cargo and freight insurer requested and eight declined to request, the owner of the "Etruria" to bring suit which resulted in settling the question of liability. The District Court held that the non-requesting underwriters could not share pro rata, but this was reversed by the Circuit Court of Appeals holding that the execution of a subrogation receipt was not necessary in order to give the underwriters subrogated rights and Judge Warrington said, pg. 651:

"Most of the insurers obtained subrogation receipts from the owner upon paying their shares of its loss, some of which in terms provided for full subrogation and others 'to the extent only and as provided for' in the policies, although [fol. 78] the policies do not appear to have contained any provision for subrogation. However, we do not regard this as important, nor do counsel for either side because it is settled that such provisions are not necessary. The right of subrogation arises from the very nature of the contract of insurance as a contract of indemnity. Phoenix Insurance Co. v. Erie Transportation Co., 117 U. S. 312, 321; Liverpool Steam Co. v. Phœnix Ins. Co., 129 U. S. 462;

North England Ins. Assn. vs. Armstrong, L. R. 5 Q. B. 244; Comegys v. Vasse, 1 Peter 193, 212."

And again at pg. 652:

"Admittedly, the subrogation rights of all the insurers of the 'Etruria' were, when acquired, entitled to equal protection; but it is urged that the non-consenting insurers destroyed this equality by waiver."

The Court held that the refusal to request the bringing of the suit was not a waiver of the non-consenting underwriters' subrogated rights.

The Court said at pg. 654:

"The owner sought to recover and did recover (to the extent allowed) the proportionate shares alike of all the insurers. True, it did so in its name as owner, but at last in virtue of its Trusteeship respecting such shares."

At pg. 656, the Court said:

"It is settled in this court that so far as time is concerned, it is competent to intervene before final distribution of such a fund is made, for the purpose of presenting claims to an interest therein and for their establishment by decree. Mason v. Marine Insurance Co., 110 Fed. 452, 454; Continental Trust Company v. Toledo, St. L. & K. C. R. R. Co., 82 Fed. 642, 646; Central Trust Co. v. Richmond N. I. & B. R. Co., 105 Fed. 803, 808; See The Propeller Monticello v. Mollison, 17 Howard 152, 155; The Nonpareil, 149 Fed. 521, 525; but the priority given by the decree below to the expense of the libel litigation should be preserved as against appellants as well as appellees. Trustees v. Greenough, 105 U. S. 527; Central R. R. Co. v. Pettus, 113 U. S. 124, 126."

[fol. 79] The Court held in conclusion at page 657:

"That the claims of all the insurers of the hull, (of the 'Etruria') appellees and appellants alike, must be placed on an equality; and the claims for freight and crew will be placed on a parity with them."

Counsel for the Scottish Metropolitan urge that the terms of the insurance policies defeat the right of the Standard

Marine Insurance Company to be subrogated on an equality with the Scottish Metropolitan Assurance Company. The answer to this is that the right of subrogation is not founded on a contract between the insurer and the insured for the test is whether the insurer was obliged to pay and did pay a loss to the insured, and the amount of such payment. Such was the holding in The "Livingstone," 130 Fed. 746, where the S. S. "Grand Traverse" was sunk in Lake Erie in collision with the S. S. "Livingstone," and it was held that where the loss had been paid by the insurer and recovery was had by the insurer against the negligent vessel and there was an excess in the recovery over the amount of the insurance, the underwriters were not entitled to receive out of the money recovered, more than the underwriters had paid to the insured.

Coxe, Judge, in pointing out that policy valuation had no effect on the right of subrogation, said at pg. 749:

"Why the agreement of the parties upon a convenient basis of calculation should operate to change the principle upon which the insurer had, theretofore, been reimbursed, to the extent of his payment under the policy, it is not easy to understand."

And the Court cited with approval Memphis Railroad v. Dow, 120 U. S. 287, 301, as follows:

"The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties."

From this case it appears that the Court holds that when it is considering subrogating rights of an underwriter who has paid a loss, the only material points are, how much has the underwriter paid and how much has the assured recovered against the wrong had with respect to the property which the underwriter insured? As Judge Warring-[fol. 80] ton said in the "Etruria" case supra, 202 Fed. 648, pg. 652:

"It is true, as claimed, that such right (the right of subrogation) is not founded on contract, but is a creature of equity (Memphis etc. R. R. v. Dow, 120 U. S. 301, 302,

7 Sup. Ct. 482, 30 L. Ed. 595); still it is none the less a right that is entitled to protection, and, as Justice Harlan said in that case, is enforced for the purpose of 'accomplishing the ends of substantial justice.'"

The English rule seems to be the same and it was so held in Thames & Mersey Marine Insurance Co. v. British & Chilean S. S. Co., 13 Asp. Mar. Cas. 221; (1916) 1 K. B. 30. There had been a total loss by a collision between the "Helvetia" and the "Empress of Britain" and both ships were held to blame. It was held that the underwriters were entitled to recover to the extent they had paid in respect to the subject matter they had insured, namely, the "Helvetia," in sums which defendant had received in respect of the loss of the same subject matter though that sum was based upon a larger sum than the insured subject matter.

This decision of the case in the Kings Bench Division appears in (1915) 2 K. B. 214, where Scrutton, Judge, said at pg. 221:

"I am, therefore, as a judge of first instance, bound by it (the decision in Armstrong's case, L. R. 5 Q. B. 244) and in my view it compels me to hold that the underwriters here are entitled to recover to the extent to which they have paid in respect of the subject matter insured any sum which the ship owners have received as a right in respect of the loss of the same subject matter, though that sum is based on a larger value than the insured value."

The controversy concerned what was actually insured by the policy of each company. The Standard Marine Insurance Company policy is to Louis Dreyfus & Company "upon all kinds of lawful goods, wares, merchandise and products, laden on board the good vessel or vessels * * * lost * * * at and from port to ports * * *" and the rider clause (Standard Policy (A) above) provides to cover "increased value on grain owned by the assured or in which the assured may have an interest, such increased value for the purpose of this insurance to be arrived at * * * etc."

[fol. 81] The policy of the Scottish Metropolitan Assurance Company provides that on account of whom it may concern, the assured, in this instance the shipper, do make insurance as per the form attached to the policy, which

is (Scottish Policy A) "to cover 100% interest in all shipments of grain and/or flax seed and/or cereals and/or maize, from owner, or in which they may have an insurable interest * * *."

From both policies it thus appears that res, or subject matter insured, is a cargo of grain, 200,000 bu. of wheat. While the Scottish Metropolitan Assurance Company policy is a "valued" policy, from the policy and the certificates of insurance issued on October 26, 1924, it appears the cargo insured consisted of 200,000 bu., the price of which per bu. per Exhibits A and B at the point of shipment was $1.38½ C. I. F., yet it was insured in this "valued" policy at $1.42 per bu., so that the loss on 200,000 bu. was $284,000.

The res, or subject matter insured, by the Standard Marine Insurance Company policy by its terms was upon "lawful goods, wares, merchandise and products laden on board the good vessel" and the rider was attached to the policy which contained the words "to cover 'increased value' on grain." This language would seem to indicate that the thing insured by the Standard Marine Insurance Company was also a cargo of grain.

The Scottish Metropolitan claims that the res insured by the Standard was profits and bases such claim on the fact that of the use of the words "increased value" in the Standard policy, while its policy is for "100% interest in all shipments of grain," and that its policy is a "valued" policy while the policy of the Standard Marine Insurance Company is an "open" or "unvalued" policy.

In considering the res, or subject matter, covered by each policy, the insurance effected on each separate bushel of wheat is important.

The Scottish Metropolitan policy is on 200,000 bu. of wheat at $1.42 per bu. As shown in Exhibits A and B, the C. I. F. price of this wheat was $1.38½ and the insurance was effected at $1.42.

The Standard policy covers the "increased value" on the same wheat for that rate which the market price in Montreal is above the C. I. P. price plus 5¢ per bu. The Montreal price was fixed by the claim filed by Louis Dreyfus & Company and allowed by the Standard at $1.64¾ per bu., which plus the 5¢ per bu., makes up the $1.69¾ per bu., [fol. 82] making a difference of 31¼¢ per bu., which was

the basis of payment made by the Standard Company policy, and so paid.

The price of $1.54¾ per bu. was fixed by the former Court order as the value of the wheat when lost so that the difference between $1.54¾ and $1.69¾ per bu. or 15¢ per bu., is $30,000; also, it should be remembered that the Scottish Metropolitan insured above the C. I. F. price, the difference between $1.38½ and $1.42 or 3½¢ per bu., which on 200,000 bu. is $7,000. It thus appears that that part of the price of each bushel of wheat between $1.38½ and $1.42 was insured by both companies and payment to Louis Dreyfus & Company, the cargo owner, was made by both companies without protest. The $30,000 above and the $7,000 together make up the $37,000, which sum is the amount paid by the underwriters in excess of the value of the wheat as allowed by the Court's former decree.

From the decision in the Livingstone case supra, it would appear that Louis Dreyfus & Company would not be entitled to hold any part of this $37,000 excess of payment over actual insured value as against the claims of the underwriters. Insurance companies being subrogated to the rights of Louis Dreyfus & Company, neither can thereby acquire any greater right than Louis Dreyfus & Company had.

Claim is made that there is no double insurance since the companies insured different risks. Double insurance is defined in 38 Corpus Juris 1159 under Marine Insurance as:

"Double insurance is where insured procures two or more insurances upon the same interest, on the same property and for the same risk."

The Scottish Metropolitan Assurance Company insured at $1.42 per bu. which was 3½¢ above C. I. F. at port of shipment on October 27, and paid on basis of $1.42; yet the Court found that the value of the wheat was $1.54¾ at port of shipment on October 27, so that the language "100% interest" in the cargo, as used in Scottish Metropolitan Assurance Company policy must mean 100% interest in subject matter as distinguished from 100% interest in value as such. The actual facts as to varying values show it could not refer to 100% value; and, of course, since it was a valued policy, parties themselves fixed the values,

but this fact should not deter one in arriving at the meaning of the language used.

[fol. 83] The Scottish Metropolitan Assurance Company claims that since the Standard Marine Insurance Company policy covers "increased value" that policy is one "on profits" while its policy is on value; and that thus different subject matters were insured and consequently there can be no double insurance or contribution between the underwriters.

In considering the res, or subject matter, of the Standard Marine Insurance Company policy of which the language is "to cover increased value on grain," it appears that this "increased value" by the agreed facts, is that range in price from $1.38½ per bu. to $1.69¾ per bu., or 31¼¢. Analyzing this difference in price, the Standard Marine Insurance Company covers $1.38½ C. I. F. at point of shipment to $1.42 or 3½¢ which was also covered by the policy of the Scottish Metropolitan Assurance Company. From $1.42 to $1.54¾ value at point of shipment as fixed by the decree or 12¾¢, is covered only by the Standard Marine Insurance Company; from the difference in price at point of shipment on date of loss, $1.54¾, to difference at point of destination $1.64¾ or 10¢ per bu. was also covered only by the Standard Marine Insurance Company. The Standard Marine Insurance Company policy also covers an additional 5¢ which made up the balance of the valuation and the limit of its coverage. Thus, of the 31¼ covered by the Standard Marine Insurance Company policy by the admitted fact, 26¼¢ of the price per bu. paid by the Standard Marine Insurance Company was on actual value above the C. I. F. price.

The Standard Marine Insurance Company urges that the use of the words "increased value" in clause three of the policy necessary to properly describe the amount of the coverage which the shipper had under its C. I. F. contract, and that the insurance provided in clause three of its policy was not "profits" insurance. Insurance on profits although perfectly legal, is a speculative insurance and it cannot be said that there was anything speculative about the insurance provided in clause three of the Standard Marine Insurance Company policy. The amount of the insurance provided by that clause was based on real value, the different provisions in clauses four and three of the Stand-

ard Marine Insurance Company policy do not change the kind of insurance, they merely provide for a different amount of the same kind of insurance.

[fol. 84] It is further urged that the Standard Marine Insurance Company policy is a speculative one. From the analysis above, it will be seen that such can only result if it were to be held that the 5¢ provision made the Standard Marine Insurance Company policy speculative; and that because of that 5¢ the whole policy should be called a speculative policy; but this should not result since the 5¢ is less than 3% of the price quotation. Again, if it were to be held that the Standard Marine Insurance Company policy is speculative, what is to be said of the Scottish Metropolitan Assurance Company rate, which provided an additional 3½¢ above the C. I. F. price? That policy would also be speculative and one on profits with the result that the two policies, being of the same kind, the underwriters should prorate in the distribution of the fund.

Canada Sugar Refining Co. vs. Ins. Co. of North America, 175 U. S. 609, presents a case of insurance on "profits." The language being "$15,000 on profits on cargo of sugar against total loss only, valued at sum insured," properly held that where there had been a total loss of cargo, with the total loss of profits with separate insurance on cargo and on profits as such, the assured may in case of total loss of cargo abandon the cargo to the underwriters on cargo and collect in full from the underwriters on profits. The case held that where there is insurance on profits in case of loss the assured does not need to know that there would have been any profits if the goods had arrived at destination, citing Patapsco Ins. Co. vs. Coulter, 3 Peters 222; or in other words, insurance on profits while perfectly legal insurance is speculative. In the present case the insurance on increased value issued by the Standard Marine Insurance Company was on actual excess and proved value of 26¼¢ per bu. over the amount of the C. I. F. price and the additional constant of 5¢ over the market value should not change this insurance on actual and proved value of the cargo of grain to speculative insurance on profits.

Insurance on profits seems to be a very different thing from the insurance on cargo where the amount of the latter insurance is necessarily described as insurance on increased

value. Insurance on profits is well known and is held to be speculative insurance.

The Patapsco Insurance Co. vs. Coulter, 3 Peters 222;

[fol. 85] Canada Sugar Refining Co. vs. Insurance Co. of North America (1900) 175 U. S. 609;

O'Brien vs. North River Ins. Co. (1914 C. C. A. 4C) 212 Fed. 102;

Mumford vs. Hallett, 1 Johns. (N. Y.) 439.

Counsel for Scottish Metropolitan finally urge that the warranty against insurance which appears in the Standard Marine Insurance Company policy (Standard Policy C, above) supports their claim that the Standard Marine Insurance Company expressly agreed that it did not insure in respect of the grain. By that provision the Standard Marine Insurance Company warranted that any insurance granted in its policy should not cover where the Louis Dreyfus & Company or any carrier or bailee had insurance which would attach to this grain if the policy to Louis Dreyfus & Company had not been issued. This is a matter of contract between Louis Dreyfus & Company and the Standard Marine Insurance Company; the Standard Marine Insurance Company paid the full amount of the claim made by Louis Dreyfus & Company to Louis Dreyfus & Company and how can the fact of such a provision in its policy have any bearing on the claims of the Scottish Metropolitan Assurance Company? This was a matter of contract between Louis Dreyfus & Company and the Standard Marine Insurance Company and apparently the Standard Marine Insurance Company has waived its rights by making payment to Louis Dreyfus & Company. We fail to see how the existence of this clause in the Standard Marine Insurance Company policy can have any effect on the Standard Marine Insurance Company's right to subrogation against that part of the fund to be paid by the ship owners to Louis Dreyfus & Company.

Your Commissioner, therefore, reports that the petitioners, the Standard Marine Insurance Company and the Scottish Metropolitan Assurance Company, be decreed to share pro rata in the fund awarded to Louis Dreyfus & Company after payment from the fund of the expenses of litigation of said Louis Dreyfus & Company.

By stipulation, the parties hereto have agreed that fees and disbursements in amounts agreed to shall be first paid from the fund, and that either party may have ten (10) days in which to file exceptions to the Commissioner's report.

[fol. 86] Herewith are returned the following papers which have been filed in the cause:

(1) Order of reference to Wm. B. Woods as Special Commissioner.

(2) Petition of Standard Marine Insurance Company, Ltd.

(3) Amended petition of Standard Marine Insurance Co., Ltd.

(4) Petition of Scottish Metropolitan Assurance Co., Ltd.

(5) Answer of Scottish Metropolitan Assurance Co., Ltd.

(6) Answer of Standard Marine Insurance Co., Ltd.

(7) Agreed Statement of Facts.

(8) Exhibits.

(9) Brief on behalf of Standard Marine Insurance Co., Ltd.

(10) Brief on behalf of Scottish Metropolitan Assurance Co., Ltd.

(11) Reply brief on behalf of Standard Marine Insurance Co., Ltd.

(12) Reply brief on behalf of Scottish Metropolitan Assurance Co., Ltd.

(13) Letter including memorandum of Duncan and Mount, counsel for Standard Marine Insurance Co., Ltd.

(14) Letter including memorandum of Bigham, Englar and Jones, counsel for Scottish Metropolitan Assurance Co., Ltd.

Respectfully submitted.

Wm. B. Woods, Special Commissioner.

January 14, 1928.

[fol. 87] IN UNITED STATES DISTRICT COURT

EXCEPTIONS OF SCOTTISH METROPOLITAN ASSURANCE CO., LTD., TO REPORT OF SPECIAL COMMISSIONER, WILLIAM B. WOODS—Filed Jan. 23, 1928

The exceptions of Scottish Metropolitan Assurance Company, Ltd. to the report filed on January 14, 1928, by Special Commissioner William B. Woods, appointed on April 20, 1927, respectfully alleges and shows as follows:

1. In that as the parties stipulated all the facts of the case the Commissioner erred in returning any findings of fact.

2. In that the Commissioner found as a conclusion of law that by the taking of an assignment of a claim from an insured by an insurance company, such insurance company acquired no priority or advantage over another insurance company which also paid a loss to the insured under the terms of its policy.

3. In that the Commissioner found as a conclusion of law that where one marine insurance company insures a cargo of wheat of the value C. I. F. plus 3½¢ per bu. at the point of shipment, and another insures that part of the value of the market price per bu. at the point of delivery plus 5¢ per bu., which is above said C. I. F. price, and the cargo is lost, and on payment of said losses in full to the insured, the amount received by the cargo owner is in excess of what the court decrees is the value of the cargo insured, then a rule of priority of subrogation in favor of the insurance company first paying does not apply, and such excess of payments by the two insurance companies is to be returned to them pro rata.

4. In that the Commissioner found as a conclusion of law that use of the words "to cover increased value of grain" shipped, in marine insurance policy, does not necessarily make such policy one of insurance on "profits" and, therefore, speculative.

5. In that the Commissioner found as a conclusion of law that where two underwriters insured a cargo of wheat which was lost, the first underwriter by a valued policy "to cover 100% of the interest in that shipment of grain," and

the other by an open policy "to cover increased value on grain owned by the assured or in which assured has an interest," and each underwriter paid its full loss to assured [fol. 88] as the policy of each provided, which payments gave to the assured a sum greater than the value of the cargo as found by the Court, and the Court has also held that assured should recover from the negligent ship owners the value of the cargo, the two underwriters are subrogated to the rights of assured against the ship owners.

6. In that the Commissioner found as a conclusion of law that where the underwriter claiming on a valued policy based on a so-called "100% interest" in the cargo claims priority over the underwriter on an open policy, which is on "increased value" of the interest in cargo, the equitable rule to be followed since both are subrogated to the rights of the assured is that a priority shall not prevail and the two subrogated underwriters should share pro rata after payment of the expenses of litigation from the fund in the amount awarded the assured from the negligent ship owners; and that the assured may be made whole for his loss on the cargo, the order of disbursement of the fund should be: (1) expenses of litigation of cargo owner; (2) balance of fund to be paid pro rata to the two underwriters, since the assured has already been made whole by payment from the underwriters.

7. In that the Commissioner failed to find that the right to subrogation arises out of the contract of insurance and is limited to the interest insured.

8. In that the Commissioner failed to find that there can be subrogation only in respect of the interest insured.

9. In that the Commissioner failed to find that when the fund recovered by an insured is insufficient to repay two underwriters solely because one of the underwriters has insured the interest described as increased value at a sum in excess of its actual value, such underwriter should not be permitted to deprive the other of a full recovery.

10. In that the Commissioner failed to find that a recovery by an insured is for the benefit of underwriters in respect of the interests insured by each and when the interest insured by one underwriter is in respect of grain and the [fol. 89] interest by the other is in respect of "increased

value," the right to subrogation is limited to the interests thus described.

Dated, January 23rd, 1928.

Day & Day and Bigham, Englar & Jones, Proctors for Exceptor Scottish Metropolitan Assurance Company, Ltd.

IN UNITED STATES DISTRICT COURT

OPINION SUSTAINING EXCEPTIONS TO REPORT OF SPECIAL COMMISSION.—Filed July 18, 1928

JONES, J.:

This matter is before the Court on exceptions to the report of the Special Commissioner, to whom had been referred for findings of fact and conclusions of law the issues raised between the Scottish Metropolitan Assurance Company, Ltd. and the Standard Marine Insurance Company, Ltd., concerning the distribution of money paid by the underwriters for the loss of a cargo of wheat. The Commissioner found and concluded upon full hearing that the companies should be decreed to share pro rata in the fund awarded to the owner of the cargo after the payment of expenses of litigation incurred by the owner.

The facts were stipulated by the parties and are set forth fully in the report of the Commissioner. The Scottish Company issued its policy on the cargo of wheat for the full value of the wheat at an agreed full valuation of $284,000.00. The Standard Company later issued an open policy on the same cargo to cover increased value on the grain [fol. 90] and indemnifying against loss on the basis of the difference between invoice value and the highest market value, plus five cents, between the day of sailing at the point of shipment and the day of final delivery at destination. The cargo was lost in collision and both companies paid the full amounts provided by the policies. In the limitation of liability proceedings which followed, the value of the cargo was fixed at a total value of $309,500.00. The Scottish Company paid to the owner of the cargo $284,000.00; the Standard Company, $62,500.00.

The distribution of the fund found by decree of court is the question for decision. The Standard Company contends that the fund should be distributed pro rata between the underwriters; the Scottish Company asserts that it should be entitled to reimbursement in full in preference to any payment to the Standard Company.

Since the fund in dispute arises out of a liability fixed by decree of court based upon value of the cargo at the time and place of shipment, the question of subrogation seems to be important.

It will not be possible to review the findings of the Commissioner at this time, nor to set down fully the considerations upon which a conclusion has been reached.

Upon consideration of the questions presented, I am constrained to take an opposite view from that reported by the Commissioner. The insurer is in equity subrogated to such rights only as the assured had. If the owner of the wheat is limited in his right to recover against the offending ship for loss based upon value at the time and place of shipment, it seems clear that subrogation can extend only to such limit or value. Since the owner of the cargo could not recover against the Miller for increased value based upon a market price at the point of delivery, no such right could pass to or be enforced by the Standard Company. Subrogation does not arise out of the contractual liability of the insurer to pay a specified sum upon loss, but depends upon the right of the loser of the cargo to collect from the wrongdoer. The increased value of the wheat was not a loss which the Miller was required to pay. Subrogation extends only to that which the assured can recover. Despite the language of the Standard policy, it was not in fact or law insurance upon the cargo but upon [fol. 91] the price at the point of delivery, for the loss of which there was no recovery by the owner of the cargo against the offending ship and, therefore, no subrogation.

The indemnity provided by the Standard policy did not cover the character of loss for which recovery could be had by the owner against the Miller, and, therefore, the Standard Company is not entitled to prorate with the Scottish Company in the distribution of a fund representing actual value at the time and place of shipping. I think

the Scottish Company entitled to full payment from the fund.

The exceptions to the Commissioner's report will be sustained, and the Standard Company may have exceptions to the ruling here made.

Paul Jones, United States District Judge.

July 18th, 1928.

In United States District Court

Order Sustaining Exceptions to Report of Special Master.—July 18, 1928

This day this cause came on to be heard on the exceptions to the report of the Special Commissioner and was submitted to the Court; on consideration thereof the Court sustained said exceptions, to which ruling of the Court, Standard Marine Insurance Company, Ltd. by its proctors, excepts.

[fol. 92] In United States District Court

Final Decree; Exceptions to Commissioner's Report Sustained; Distribution and Payment of Collision-Recovery Fund Directed to Be Made to Designated Cargo Underwriters.—Sept. 26, 1928, by Paul Jones, Judge

A final decree having been entered herein awarding to the claimants Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners, trading under the firm name and style of Louis-Dreyfus & Company, owners of a cargo of 208,392.40/60 bushels of wheat on the steamship "Glenorchy," the sum of $322,487.65 with interest thereon at the rate of five per cent (5%) per annum from October 29, 1924, until paid as the value of the said cargo at the port of shipment without including any element of increase in value of the cargo which might have resulted if the vessel had reached destination;

And it appearing that the parties have agreed that the Scottish Metropolitan Assurance Company, Limited, is

entitled to receive the entire sum recovered in respect of 8,392-40/60 bushels of wheat which has been computed and agreed to be the sum of $12,987.65;

And the Standard Marine Insurance Company, having filed a petition herein for distribution to it of a sum in excess of $56,000 of the remainder of said fund, on the ground that it insured and paid said sum to Louis-Dreyfus & Company under an open policy relating to 200,000 bushels of the cargo covering increased value and indemnifying against loss on the basis of the difference between invoice price and the highest market value, plus five cents, between the day of sailing at the port of shipment and the day of final delivery at destination;

And the Scottish Metropolitan Assurance Company, Limited, having filed herein a petition for distribution to it of $284,000 with interest from the 29th day of October, 1924, out of said fund, on the ground that it insured and paid said sum to Louis-Dreyfus & Company under an ordinary cargo policy on the said 200,000 bushels of the cargo, as the full value of the wheat at the time of shipment at an agreed full valuation of $284,000.00;

And the Court having referred the issues on said petitions to William B. Woods, Esquire, as Commissioner, for report;

And the parties having filed with said Commissioner an agreed statement of all the facts;

[fol. 93] And the said Commissioner, after hearing argument of counsel, having filed herein his report recommending that the Standard Marine Insurance Company and the Scottish Metropolitan Assurance Company, Limited, be decreed to share pro rata in $309,500 representing the value of 200,000 bushels, which is the remainder of said fund after deducting the sum of $12,987.65 as aforesaid.

And the Scottish Metropolitan Assurance Company, Limited, having filed exceptions to the report of said Commissioner and said exceptions having duly come on for hearing and having been submitted by counsel for both parties on briefs filed with the court, and due consideration and deliberation having been had, and the court having filed herein its opinion that the exceptions to said Commissioner's report should be sustained; that the Scottish Metropolitan Assurance Company, Limited, recover

in full and not on a pro rata basis from said fund the sum of $284,000, with interest at five per cent (5%) per annum from the 29th day of October, 1924, and costs, being the sum insured by it, without deduction; and that the Standard Marine Insurance Company, Ltd., recover only from the remainder left of said fund after the petition and claim of the Scottish Metropolitan Assurance Company, Limited, have been satisfied and paid in full; and good cause appearing therefor.

It is hereby ordered that there be first paid from said fund to the Scottish Metropolitan Assurance Company, Limited, the said sum of $12,987.65 with interest at the rate of five per cent (5%) per annum from October 29, 1924, to April 29, 1928, amounting to $2,272.84, a total of $15,260.49; and

It is hereby further ordered that the said exceptions to the Commissioner's report be and the same hereby are sustained, with costs in the sum of $—; and

It is hereby further ordered that the said petition of the Scottish Metropolitan Assurance Company, Limited, be granted, and that there be immediately paid from the Registry of this court and/or by the owners and stipulators for value of the steamship "Leonard B. Miller" to the Scottish Metropolitan Assurance Company, Limited, the sum of $284,000 with interest thereon at the rate of five per cent (5%) per annum from October 29, 1924, to April [fol. 94] 29, 1928, amounting to $49,700.00, and with interest at said rate on $50,969.11 of said sum from April 29th, 1928, to August 18, 1928, the date of entry of this decree, amounting to $778.82; and with costs in the sum of $16.50 a total, including the $15,260.49 above named of $349,739.31, with interest thereon at the rate of five per cent (5%) per annum from the date hereof until paid, and that the said sums be paid to the proctors of record for said Scottish Metropolitan Assurance Company, Limited, in this case, and their receipt accepted for the same as final; and

It is further ordered that the Commissioner be paid from said fund of $322,487.65, his costs in the sum of $1,245.00; and

It is further ordered that the petition of the Standard Marine Insurance Company, Ltd., be denied with costs,

provided, however, that there be paid to the proctors for the Standard Marine Insurance Company, Ltd., the remainder of said fund (their receipt being accepted for the same as final); and

It is further ordered that the sum of $620, the said portion of the expenses payable by the Standard Marine Insurance Co., Ltd., be paid from said fund to the proctors for the Scottish Metropolitan Assurance Company, Limited; and

It is further ordered that by payment of the sums aforesaid this decree shall stand satisfied.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL.—Filed Dec. 1, 1928

To the Honorable Paul Jones, District Judge:

The intervening petitioner, Standard Marine Insurance Company, Ltd., conceiving itself aggrieved by the final decree entered in this cause on the 26th day of September, 1928, whereby the Court among other things, adjudged and [fol. 95] decreed that the above named intervening petitioner, Standard Marine Insurance Company, Ltd., was not entitled to share pro rata with the Scottish Metropolitan Assurance Company, Ltd., in the fund of $309,500.00, with interest thereon at the rate of five (5) per cent per annum from October 29, 1924, and that the Scottish Metropolitan Assurance Company, Ltd., should have and receive out of the said fund of $309,500.00 with interest, which fund represented the recovery awarded to Dreyfus & Company as owner of 200,000 bushels of wheat on the S/S. "Glenorchy" which was insured by both the Standard Marine Insurance Company, Ltd., and the Scottish Metropolitan Assurance Company, Ltd., full reimbursement in the sum of $284,000.00 with interest thereon at the rate of five (5) per cent per annum from October 29, 1924, and that the Standard Marine Insurance Company, Ltd., was only entitled to receive the balance of such fund after such payment in full to the Scottish Metropolitan Assurance Company, Ltd., and which also ordered that the Commis-

sioner's costs of $1245 be paid out of the fund representing cargo's recovery, now comes by its counsel and petitions this Court for an order allowing said Standard Marine Insurance Company, Ltd., to prosecute an appeal from said decree as above set forth to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, under and according to the laws of Congress and the statutes of the United States in such cases made and provided; and that a transcript of the record containing the testimony, exhibits, stipulations and all proceedings herein duly authenticated shall be prepared under the supervision of the Clerk and be forthwith transmitted to said the United States Court of Appeals.

Respectfully submitted.

Duncan & Mount, James M. McSweeney, Proctors for Standard Marine Insurance Company, Ltd.

[fol. 96] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Dec. 1, 1928

The Standard Marine Insurance Company, Ltd., intervening petitioner herein, hereby assigns errors in the finding, decision and final decree of the United States District Court for the Northern District of Ohio, Eastern Division, made and entered herein on or about September 26, 1928, as follows:

First. In that the Court sustained the exceptions of Scottish Metropolitan Assurance Co. Ltd. to the report of the Special Commisioner filed herein on the 14th day of January, 1928.

Second. In that the Court failed to confirm the report of the Special Commissioner filed herein on the 14th day of January, 1928.

Third. In that the Court held that the Standard Marine Insurance Company, Ltd. was not entitled to share pro rata with the Scottish Metropolitan Assurance Co. Ltd. in the fund of $309,500., with interest thereon at the rate of five percent (5%) per annum from October 29, 1924, which

fund was the amount of the recovery awarded to Dreyfus & Company, as owner of 200,000 bushels of wheat on the S/S Glenorchy sunk in collision with the S/S Leonard B. Miller, which wheat was insured by both the Standard Marine Insurance Company, Ltd. and the Scottish Metropolitan Assurance Co. Ltd.

Fourth. In that the Court held that the Scottish Metropolitan Insurance Co., Ltd.'s policy on the said wheat was for the full value thereof.

Fifth. In that the Court held that:

"Despite the language of the Standard policy, it was not in fact or law insurance upon the cargo but upon the price at the point of delivery, for the loss of which there was no recovery by the owner of the cargo against the offending ship and, therefore, no subrogation."

Sixth. In that the Court held that the Scottish Metropolitan Assurance Co. Ltd., was entitled to full reimbursement of $284,000. with interest thereon at the rate of five percent (5%) per annum from October 29, 1924, from the fund representing cargo's recovery, and that the Standard Marine Insurance Company, Ltd. was only entitled to receive the balance of such fund after such payment in full [fols. 97 & 98] of $28,000. with interest to Scottish Metropolitan Assurance Co., Ltd.

Seventh. In that the Court ordered that the commissioner's costs of $1245.00 be paid out of the fund representing cargo's recovery.

Dated New York, November 27, 1928.

Duncan & Mount and James M. McSweeney, Proctors for Standard Marine Insurance Company, Ltd.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FIXING BOND.—December 1, 1928

On petition of Messrs Duncan & Mount and James M. McSweeney, counsel for Standard Marine Insurance Co.,

Ltd., intervening petitioner herein, it is ordered that an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the decree heretofore filed and entered in this cause on the 26th day of September, 1928, be and the same is hereby allowed, and that a certified transcript of the record in accordance with the rules of the Courts of the United States be transmitted to said United States Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed in the sum of Two Hundred Fifty Dollars.

Bond on appeal for $250.00, approved and filed December 8, 1928, omitted in printing.

[fols. 99 & 100] Citation, in usual form, showing service on Day & Day and Bigham, Englar & Jones, omitted in printing.

[fol. 101] In United States District Court

Stipulation re Certification of Record—Filed Dec. 7, 1928

In accordance with Section 7 of Rule 44 of the general rules of this Court, it is hereby agreed that the record as presented to the Clerk by the printer, may be certified by the Clerk as required by law and the rules of the Appellate Court, as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the clerk.

Duncan & Mount and James M. McSweeney, Proctors for Standard Marine Insurance Company, Ltd. Bigham, Englar & Jones, Day & Day, Attorneys for Scottish Metropolitan Assurance Company, Ltd.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO THE TRANSCRIPT OF RECORD—Filed Dec. 7, 1928

It is hereby stipulated and agreed that the foregoing is a true transcript of so much of the record of the said District Court in the above entitled matter as is pertinent to the appeal herein.

Dated Dec. 5, 1928.

Duncan & Mount and James M. McSweeney, Proctors for Standard Marine Insurance Company, Ltd. Bigham, Englar & Jones, Day & Day, Proctors for Scottish Metropolitan Assurance Company, Ltd.

[fol. 102] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed Dec. 7, 1928

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

1. Petition of Columbia Steamship Company for Limitation of Liability as owner of the Steamer Leonard B. Miller.

2. Opinion of Judge Jones on the merits in the limitation proceedings.

3. Stipulation covering damages.

3a. Order allowing filing of affidavit of James T. Irving.

4. Original affidavit of James T. Irving covering prices of wheat in store at Fort William or Port Arthur.

5. Final decree on the merits in limitation proceedings.

6. Amended petition of intervention of Standard Marine Insurance Company, Ltd., April 23, 1927.

7. Answer of Scottish Metropolitan Assurance Company, Ltd., to said amended petition.

8. Petition for intervention of Scottish Metropolitan Assurance Company, Ltd.

9. Answer of Standard Marine Insurance Company, Ltd., to said petition.

10. Order of April 20, 1927, referring case to William B. Woods, Special Commissioner.

11. Agreed statement of facts together with Exhibits A to G inclusive.

12. Report of William B. Woods, filed January 14, 1928.

13. Exceptions of Scottish Metropolitan Assurance Co., Ltd., to said report.

14. Opinion of Judge Jones, dated July 18, 1928, sustaining exceptions to said report.

15. Formal rule of court sustaining said exceptions.

[fols. 103 & 104] 16. Final decree sustaining exceptions and directing distribution of fund.

17. Petition of Standard Marine Insurance Co., Ltd., for Appeal.

18. Assignments of error.

19. Order allowing appeal of Standard Marine Insurance Company, Ltd.

20. Bond for costs on appeal.

21. Citation on appeal.

22. Stipulation under Section 7 of Rule 44 as to the record.

23. Stipulation as to the transcript of the record.

24. Clerk's Certificate.

25. Order extending time for filing transcript of record.

26. Præcipe for transcript of record.

And deliver all papers to The Gates Legal Publishing Company for printing.

Duncan & Mount and James M. McSweeney, Proctors for Standard Marine Insurance Company, Ltd.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING TRANSCRIPT OF RECORD—January 3, 1928

On application made and for good cause shown, it is ordered that the time for filing the transcript of record in the United States Circuit Court of Appeals be extended to February 6th, 1929.

[fols. 105 & 106] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 107] Appearance of counsel omitted in printing.

Minute entry of argument and submission January 9, 1930, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

JUDGMENT—Filed April 7, 1930

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed with costs.

[fol. 108] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed April 7, 1930

Before Denison and Hickenlooper, Circuit Judges, and Tuttle, District Judge

TUTTLE, District Judge:

This admiralty proceeding involves the rights of two marine insurers, appellant and appellee here, to share, by

subrogation to the rights of the insured, in a certain fund recovered by the insured as damages for a part of a loss covered by insurance paid to the insured by said insurers.

Before any of the insurance in question had been effected the insured had purchased two hundred thousand bushels of wheat, for future delivery at Montreal, Canada, at a C. I. F. invoice of $1.38½ per bushel. This wheat was insured by the seller for the benefit of the purchaser as the insured, with the appellee insurer, at an agreed valuation of $1.42 per bushel. The policy included the following provision: "In case of any insurance upon the said goods subsequent in date to this Policy, the said Assurers shall nevertheless be answerable for the full extent of the sum by them insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made."

Thereafter, the insured obtained from the appellant insurer additional insurance upon this wheat on the following basis, and to the following extent, as provided in the policy of said insurer: "To cover 'Increased Value' on grain owned by the Assured or in which the Assured may have an interest, such 'Increased Value' for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five cents), as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the Certificate, both days inclusive; and in the event of casualty, to be valued at the difference between the C. I. F. [fol. 109] invoice cost and the highest market value per bushel, plus 5¢ (Five cents) as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive." This policy contained the following provision: "Provided always, and it is hereby further agreed, that if the said insured shall have made any other insurance upon the property aforesaid, prior in date to this policy, then this Com-

pany shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured."

Shortly afterwards this wheat, thus insured, was shipped on the Steamship "Glenorchy," part from Fort William and part from Port Arthur, Ontario, destined for Montreal. Two days later said steamship was in collision with another vessel, resulting in the total loss of the cargo, including the said wheat. The first insurer, the appellee, immediately paid the insured the insurance due on its policy, at the agreed rate of $1.42 per bushel, aggregating $284,000.00. The second insurer, the appellant, promptly and voluntarily paid the insured insurance on the basis of the difference between the C. I. F. invoice cost, $1.38½ per bushel, and the highest market value (apparently at Montreal) during the time (apparently ten days) which it was estimated would have been consumed by this voyage if it had not been terminated by the said collision, $1.64¾ per bushel, plus the agreed 5 cents per bushel, or $1.69¾, making the total amount of insurance so paid by the said insurer $62,500.00.

Subsequently, in the present limitation of liability proceedings in the court below, instituted by one of the vessels causing the collision, both vessels were held at fault and the insured recovered damages for the loss of this wheat, based on its actual value at the time and place of shipment thereof, $1.54¾, aggregating $309,500.00, with interest thereon. Both insurers, by intervening petitions in said proceedings, sought to recover, by subrogation to the rights of the insured against the offending vessels, a share in the said fund. The district court held that the first insurer was entitled to be reimbursed, out of this fund, for the entire amount which it had paid to the insured [fol. 110] for the loss of said wheat at the agreed value, $1.42 per bushel, under its policy already mentioned, and that the second insurer was entitled only to the balance remaining in said fund after the payment of the court costs and the amount thus awarded to the first insurer. To review this ruling of the district court the second insurer has brought the case by appeal to this court, claiming that it is entitled, by right of subrogation, to share pro rata with the other insurer in the fund recovered by the insured.

We think it clear that the district court did not err in its disposition of the question here involved. It is settled law that although an insurer who has paid to its insured insurance on a loss is entitled to be subrogated to whatever rights such insured has against a wrongdoer responsible for such loss, yet such right of the insurer is derived from, and is limited to, the rights which the insured has, as against such wrongdoer, with respect to the recovery of such damages for such loss. Phoenix Insurance Co. v. Erie & Western Transportation Co., 117 U. S. 312. The only rights, therefore, which either of these insurers has, under the principle of subrogation invoked by them, against the vessels causing the loss of this wheat or against the fund recovered by the insured from such vessels, are the rights which the insured itself had and on which such recovered was based. The sum of the rights of the insured in that connection is the measure and limit of the rights of these insurers, by subrogation, in this fund.

As, therefore, the amount of damages recoverable (The Vaughan and Telegraph, 14 Wall. 258) and recovered by the insured against the offending vessels was based upon the actual value of this wheat at the time and place of shipment, that is, $1.54¾ per bushel, that sum represents the maximum amount in which the insurers are entitled to share by subrogation. As, then, the appellee paid the insured $1.42 per bushel and the appellant paid the insured the difference between the C. I. F. invoice cost, $1.38½ per bushel, and the value so recovered as damages by the insured, $1.54¾ per bushel, and neither insurer can claim by subrogation any amount in excess of the last-mentioned sum, the fund in question is sufficient to pay each insurer the full amount to which it is entitled from such fund except as to the difference between said invoice cost, $1.38½, [fol. 111] and $1.42, the agreed value paid by the appellee, or 3½¢ per bushel, which sum was paid to the insured by both of the insurers. As, however, under the provisions of the policies already quoted, the appellant was specifically exonerated from liability for the amount of its insurance which was also covered by this prior insurance, while the appellee was expressly required to pay the entire amount of its insurance without regard to insurance by subsequent insurers and "without right to demand contribution

from such subsequent insurers," the appellant, in paying to the insured this 3½¢ per bushel which only the appellee was bound to pay acted as a mere volunteer and is not entitled, at least as against the appellee, to now recover any part of such payment from this fund. Ætna Life Insurance Co. v. Middleport, 124 U. S. 534.

We see no merit in the complaint of the appellant that the court erred in directing that the fee of the Special Commissioner who made a report to said court on the questions here involved should be paid from the fund before payment to the appellant of its share therein.

We agree with the district court that under the principles of subrogation as applied to the circumstances of this case the appellee is entitled to be paid from the fund in controversy the full amount which it paid to the insured and that, after payment of said amount and of the commissioner's fee already mentioned from such fund, the appellant is entitled only to the balance thereof. Whether this disposition of the fund is based upon a right of priority, in the strict sense of the term, of the appellee, or whether it merely happens to result from the fortuitous circumstances already mentioned, is a question which we have no occasion to decide. It is clear that appellee is interested in this fund to the extent of $1.42 per bushel and that appellant is interested therein (by subrogation to the rights of the insured) only to the extent of the difference between $1.42 and $1.54¾. The practical result is that to the extent just indicated each insurer recovers from the fund the full amount to which it is entitled under the doctrine of subrogation, while as to the 3½ cts. below $1.42 and as to the 15 cts. above $1.54¾ (the portions of its insurance not recoverable through subrogation) the appellant has no interest in said fund. The judgment is affirmed with costs.

[fol. 112] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 113] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,183. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 261. Standard Marine Insurance Company, Ltd., petitioner, vs. Scottish Metropolitan Assurance Company, Ltd. Petition for a writ of certiorari and exhibit thereto. Filed July 7, 1930. File No. 35,183.